Supreme Court
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85-1434

No. 85-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES TIERNEY, *et al.*,

Petitioners,

v.

CITY OF TOLEDO, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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February 27, 1986

QUESTIONS PRESENTED

1. Where a city ordinance requires public employees to either join a union or pay an agency fee equal to 100% of a voluntary member's dues, may the city satisfy its due process obligations by providing the objecting agency fee payors with only a *postdeprivation* internal union arbitration and rebate system, rather than some form of neutral predeprivation procedures?

2. If a public employer may satisfy its due process obligations in an agency fee scheme by providing the objecting agency fee payors with only a postdeprivation internal union arbitration and rebate system, will that postdeprivation system still satisfy due process even if it "does not eliminate all opportunity for the union to use some portion of the [agency fee] for a short period for political purposes"?*

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* *See* Memorandum and Order of the District Court, Dec. 11, 1984 (Appendix B, *infra*).

LIST OF PARTIES TO THE PROCEEDINGS

The plaintiffs-petitioners in this case are:

James Tierney, Patsy Vaillant, Ulysses Howard, William C. Parton, John H. Cousino, John E. Jordan, Sr., Robert Spencer, Edwin Sommers, William Thompson, Robert F. Mitro, Melvin Lykowski, Joseph Martin, Dale Homer, Dale Siefke, James Lagger, James Porter and Patrick Allen.

The defendants-respondents in this case are:

The City of Toledo, Ohio, and the Toledo Police Patrolmen's Association, Local 10; and the following persons in their individual and official capacities: Doug DeGood, Gene Cook, Bill Copeland, Alice Lyczkowski, Ray Nies, Donna Owens, Leo Pucetti, Max Reddish, Peter Ujvagi, Larry Brewer, David Boston and William A. Dunn.

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JAMES TIERNEY, *et al.*,

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v.

CITY OF TOLEDO, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Petitioners James Tierney, *et al.*, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit. The court of appeals held, *inter alia*, that a public employer (the City of Toledo) could require nonunion police officers (petitioners) to pay an agency fee equal to 100% of a voluntary member's dues to a labor union, without any prior judicial determination of the purposes and uses of the agency fee money. The lower court upheld the constitutionality of a postdeprivation internal union rebate system and held that before petitioners could utilize the protections of the Civil Rights Act, 42 U.S.C. § 1983, to further challenge the agency fee scheme, they were required to exhaust the union's rebate system.

OPINIONS BELOW

The opinion of the court of appeals, which was designated for non-publication, is reproduced in Appendix A

to this petition. The opinion of the U.S. District Court for the Northern District of Ohio denying petitioners' motion for a preliminary injunction has not been reported and is reproduced in Appendix B to this petition. The final judgment and opinion of the district court has not been reported and is reproduced in Appendix C to this petition.

Finally, the court of appeals has issued an order staying the mandate in this case pending the filing of the instant petition for a writ of certiorari. That order of the court of appeals is reproduced in Appendix E to the petition.

JURISDICTION

The decision of the court of appeals in the consolidated appeals was entered on January 14, 1986.[1] This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This petition is filed within ninety (90) days after the entry of the decision of the court of appeals, pursuant to 28 U.S.C. § 2101(c) and Rule 20.2, Rules of the United States Supreme Court. Additionally, this petition is being filed within thirty (30) days after the entry of the court of appeals' order staying the mandate. (*See* Appendix E.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a challenge to the constitutionality

[1] This case consists of two appeals which were consolidated by the court of appeals. The first appeal is from the district court's denial of a preliminary injunction. The second appeal is from the district court's entry of a summary judgment against the petitioners.

of a City of Toledo ordinance (Toledo Municipal Code § 2129.97) which permits a union to exact 100% of a voluntary union member's dues from a dissenting agency fee payor, without any neutral advance determination regarding the amount and purposes of the fee.

The City of Toledo ordinance is reproduced in full in Appendix D to this petition. Also reproduced in Appendix D is the Toledo Police Patrolmen's Association's rebate procedure promulgated pursuant to Toledo Municipal Code § 2129.97. Finally, also reproduced in Appendix D is the text of the First and Fourteenth Amendments to the United States Constitution and the text of the Civil Rights Act, 42 U.S.C. § 1983.

STATEMENT OF THE CASE

This case raises many issues identical to those currently being considered by this Court in *Hudson v. Chicago Teachers Union, Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), *cert. granted*, _____ U.S. _____, 105 S. Ct. 2700 (1985); *see also Abernathy v. San Jose Teachers Association*, 38 Cal.3d 839, 700 P.2d 1252 (1985), *cert. pending*, Case No. 85-498; *Kramer v. Board of Education of the Town of Boonton*, 99 N.J. 523, 494 A.2d 279 (1985), *cert. pending*, Case No. 85-684.

Petitioners James Tierney, *et al.*, are seventeen present and former police officers employed by the City of Toledo, Ohio. The City of Toledo has recognized the Toledo Police Patrolmen's Association (TPPA) as the exclusive bargaining representative of all police officers, including petitioners. Petitioners have chosen to refrain from membership in the TPPA.

In March 1983 the City of Toledo enacted an ordinance, Toledo Municipal Code § 2129.97, which required all police officers to either join the TPPA or pay an agency fee to the TPPA in an amount "not to exceed the amount of dues uniformly required of members of the TPPA."[2] In furtherance of its city-authorized power, the TPPA has demanded that each nonmember initially pay an agency fee equal to 100% of a voluntary member's dues.

Additionally, the Toledo ordinance mandated that the TPPA "provide a procedure for nonmembers to recover any portion of the annual fee which is expended for activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours and conditions of employment." The ordinance also provided, *inter alia*, that in the event the nonmember employees refused to pay the fee, the TPPA was authorized to pursue "collection or other remedies permissible under Ohio law."[3]

In April, 1983, the TPPA formally demanded payment of full dues (100%) from the nonmember employees (petitioners), despite the fact that it had established no

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[2] *See* Appendix D for the full text of Toledo Municipal Code § 2129.97.

[3] The ordinance also contains a "hold harmless" clause, purporting to relieve the City of Toledo of all liability for the administration and effect of the agency fee calculation, collection, or operation of the internal union rebate procedure. In fact, the City of Toledo does not supervise or oversee any aspect of its agency fee scheme.

[4] Petitioners named the City of Toledo, the Toledo Police Patrolmen's Association, William Dunn, President of the TPPA, and various city officials as defendants.

Basically, petitioners' lawsuit claimed:

a) that their First Amendment rights of speech and association were violated because the ordinance authorized the union to collect 100% of dues from them, some of which the city knew or should have known would be spent on political, ideological and other non-collective bargaining causes to which the employees objected; and

b) that the ordinance and union-controlled rebate procedure violated their due process rights because there was no requirement that any governmental body make a neutral determination of the proper amount of the agency fee owed *prior* to the union's calculation, demand or collection of the money, or *thereafter*. Because the city ordinance delegated to the private TPPA the right to unilaterally set and collect any amount of agency fee from dissenting nonmembers, and to unilaterally create a postdeprivation rebate remedy, the petitioners claimed a due process violation.

Subsequent to the filing of this lawsuit, the TPPA enacted a rebate system, including a partial escrow provision.[5] However, petitioners refused to pay (and to this

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Association, William Dunn, President of the TPPA, and various city officials as defendants.

[5] The TPPA rebate plan is set forth in full in Appendix D. Briefly, this plan calls for the full amount of the agency fee to be placed in an interest-bearing escrow account for the *first* year of the plan. However, for the second and all succeeding years, only a small fraction of the agency fee money will be placed into escrow, with the remainder flowing directly into the TPPA coffers without any neutral, advance determination of the proper amount of the fee. Additionally, the rebate plan calls for a private "arbitrator" to make constitutional determinations concerning the chargeability of various union expenditures. No provision is made for discovery of the union's books and records by the nonmembers.

date have never paid) any money to the TPPA or its escrow account, believing that they should not be deprived of their funds without a neutral determination of the proper amount of the agency fee being calculated, *prior* to its being paid.

The United States District Court[6] issued a series of rulings upholding the constitutionality of the Toledo agency fee scheme and the TPPA's internal rebate system. (*See* Appendices B and C.) Briefly, the district court held that there was no requirement that the City of Toledo provide any sort of predeprivation process for the petitioners. The district court held that the TPPA's postdeprivation arbitration and rebate scheme, on its face, protected the nonmembers' constitutional rights. Furthermore, it held that the nonmembers must exhaust this internal union procedure in order to fully pursue their federal civil rights claims. These rulings were made despite the trial judge's finding of fact that the rebate system did not *fully* protect the nonmembers' First Amendment rights. The trial judge explicitly found that:

> It is possible that the annual refund will, in some years, exceed the amount allocated to the escrow fund. In such years, the TPPA will have been able to use the excess amount for activities which are not germane to collective bargaining, including political purposes.

(*See* Appendix C.) Despite this factual finding, the trial court entered a summary judgment in favor of the City

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[6] With the consent of all parties, this case was initially referred to a U.S. Magistrate, pursuant to 28 U.S.C. § 636, with appeal to be taken directly to the U.S. Court of Appeals for the Sixth Circuit.

of Toledo and the TPPA.[7]

On appeal, the court of appeals also ruled that the City of Toledo was not required to provide predeprivation procedures to protect the petitioners' constitutional rights. Like the district court, the court of appeals upheld the facial constitutionality of the Toledo ordinance and the union-created postdeprivation rebate system. The court of appeals then proceeded to rule that the TPPA's postdeprivation arbitration and rebate system adequately protected the nonmembers' constitutional rights, and that the nonmembers had to exhaust the internal rebate system in order to further challenge its constitutionality. The court of appeals' per curiam opinion did not mention *Hudson v. Chicago Teachers Union*, *supra*, or discuss its applicability to this case.

This petition for a writ of certiorari follows.[8]

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[7] Petitioners had filed a motion for a preliminary injunction early in this litigation. The district court denied that motion and rejected all challenges to the validity of the ordinance and the rebate system. No appeal was taken from that ruling.

Shortly thereafter, while the instant federal case was pending, TPPA sued petitioner Tierney in the Toledo Municipal Court to collect the disputed agency fees. Petitioners then sought a second preliminary injunction, seeking to enjoin the TPPA from continuing its later-filed state court action. The lower court again refused to issue an injunction, this time ruling that an injunction against the TPPA's separate litigation was "foreclosed by the Anti-Injunction Act, (28 U.S.C. § 2283)." (*See* Appendix B, *infra*). An appeal of this second refusal to issue a preliminary injunction was filed with the U.S. Court of Appeals for the Sixth Circuit (Docket No. 85-3016).

Shortly thereafter, the district court entered summary judgment against the petitioners. The petitioners' second appeal was given Docket No. 85-3290 and consolidated by the Sixth Circuit with the prior appeal from the denial of injunctive relief.

[8] Pursuant to FRAP 41, the court of appeals has agreed to stay the mandate in this case, in order to allow the petitioners to file this peti-

REASONS FOR GRANTING THE WRIT

I. The Decision Below Directly Conflicts With The Decisions Of The U.S. Court Of Appeals For The Seventh Circuit And The Supreme Judicial Court Of Massachusetts, As Well As Decisions Of This Court.

In *Hudson v. Chicago Teachers Union*, *supra*, the U.S. Court of Appeals for the Seventh Circuit considered a due process challenge to an agency fee system very similar to the one at issue in this case.[9] In *Hudson*, the Seventh Circuit clearly held that the *public employer* must provide some form of neutral hearings *prior* to allowing the employees to be deprived of their agency fee money. *Id.*, 743 F.2d at 1196 ("the constitutional minimum would be fair notice, a prompt administrative hearing before the Board of Education or some other state or local agency . . . and a right of judicial review of the agency's decision"). Furthermore, the *Hudson* court required the use of a truly neutral *public* fact-finder or hearing officer to adjudicate the amount of the agency fee because it doubted the competence of private arbitrators to perform the delicate constitutional line-drawing discussed by this Court in *Ellis v. BRAC*, ____ U.S. ____, 104 S. Ct. 1883 (1984). *Hudson*, *supra*, 743 F.2d at

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tion for a writ of certiorari. A copy of that order is reproduced in Appendix E.

[9] As this Court is well aware, a writ of certiorari has been issued in *Hudson v. Chicago Teachers Union*, *supra*, and oral argument was held on December 2, 1985. This court also has two other similar cases pending on petitions for writs of certiorari at the present time: *Abernathy v. San Jose Teachers Association*, *supra*, and *Kramer v. Board of Education of the Town of Boonton*, *supra*. The instant case raises issues similar or analogous to those cases.

1195-96; *see also McDonald v. City of West Branch*, ___ U.S. ___, 104 S. Ct. 1799 (1984).

Similarly, in *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 431 N.E.2d 180 (1982), the Massachusetts Supreme Judicial Court refused to sanction an agency fee payment requirement without a neutral prior determination of the proper amount of the agency fee. The Massachusetts court refused to require nonunion employees to utilize an internal union rebate procedure as a proper method for protecting their constitutional rights.

> Mandating resort to the rebate procedure here would produce a further constitutional difficulty because of the requirement that the entire fee be paid to the association pending proof of legitimacy. This interim payment . . . not only deprives [the employees] of the opportunity to engage in expressive activities with those funds but also forces them to subsidize the objectionable activities of the organization.

Id., 385 Mass. at 83-84.

The decision of the Sixth Circuit in the instant case is in direct conflict with both *Hudson*, *supra*, and *Greenfield*, *supra*. Here, the Sixth Circuit upheld the constitutionality of a city ordinance which requires nonunion employees to be deprived of up to 100% of a voluntary union member's dues as an agency fee, without any neutral advance determination as to the proper amount of the fee. In contrast to the *Hudson* requirement that the *public employer* is responsible for providing *predeprivation* due process safeguards in an agency fee "taking" system, the City of Toledo has been permitted to dele-

gate all power to take property, and to "remedy" the ensuing injury, to a private labor union. The City of Toledo does not, in any manner, supervise the calculation of the agency fee, the collection of the fee, or the administration of the union's postdeprivation arbitration and rebate system.

Inexplicably, the Sixth Circuit felt compelled by this Court's prior cases to uphold the constitutionality of the Toledo ordinance and TPPA rebate procedure even though the district court had recognized a major flaw inherent in the TPPA system. The district court held that:

> It is possible that the annual refund will, in some years, exceed the amount allocated to the escrow fund. In such years, the TPPA will have been able to use the excess amount for activities which are not germane to collective bargaining, including political purposes.

(*See* Appendix C.)

However, in direct contrast, the Seventh Circuit in *Hudson* ruled unconstitutional the same type of flawed internal union procedure:

> a procedure that, lacking reasonable protection for nonunion employees, makes it likely that some of the money collected from them will be used to support political objectives . . . infringes the First Amendment even if the procedure is not shown to have resulted in any improper expenditures. Just the danger (as distinct from actuality) of depriving people of the freedom of expression guaranteed by the First Amendment has led courts to invalidate procedures that created the danger.

Id., 743 F.2d at 1192 (citations omitted). Thus, there is a direct conflict between the circuit courts over the propriety of specific postdeprivation internal union rebate systems.

Similarly, the *Hudson* and *Greenfield* courts understand that private arbitrators are not competent to engage in the constitutional line drawing required by this Court in *Ellis*. The Sixth Circuit, however, supinely held that the TPPA's private arbitrator could make these constitutional line-drawing decisions because he "would be guided and controlled by the decisions of the United States Supreme Court." Had the Sixth Circuit properly analyzed this Court's rulings in cases like *McDonald v. West Branch*, *supra*, and *Barrentine v. Arkansas-Best Freight Systems*, 450 U.S. 728 (1981), it would have recognized that this Court has only empowered arbitrators to determine the "law of the shop," not the supreme constitutional law of the land.

Finally, without citing either *Hudson* or *Greenfield* (or even the other appellate cases which might be read as supporting its decision, like *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984)), the Sixth Circuit claimed to rely upon this Court's decision in *Ellis v. BRAC*, *supra*, to support its decision. However, if *Ellis* stands for anything, it is for the proposition that a rebate system which fails to *fully* protect the employees' precious constitutional rights is invalid. Contrary to the holding of the Sixth Circuit, *Ellis* does not compel the holding that a postdeprivation (and internally flawed) rebate arrangement can provide adequate procedural due process for employees whose property has been (or will be) summarily taken. *See also Hudson v. Palmer*, ____ U.S. ____, 104 S. Ct. 3194 (1984).

Rule 17.1(b) of the Court states that one reason for granting certiorari is where, as here, the federal question decided below is in conflict with the decision of a similar court in another state or of a federal court of appeals. As shown above, the decision of the Sixth Circuit directly conflicts with decisions of both the U.S. Court of Appeals for the Seventh Circuit and the Supreme Judicial Court of Massachusetts. *See Hudson v. Chicago Teachers Union, supra,* and *School Committee of Greenfield v. Greenfield Education Association, supra.*

Currently, some nineteen states now have statutes that either require or permit agency shops for public employees. *See,* Clark, *A Guide To The Changing Court Rulings On Union Security In The Public Sector: A Management Perspective,* 14 J.L. & Educ. 71, n.1 (1985). In each of these states there are thousands of dissenters who, for various reasons, object to being forced to pay dues to an unwanted exclusive representative. These dedicated public servants have the right to know what rights they have under the Constitution with respect to the taking of their agency fees. Only this Court can give them definitive answers. The decisions of the federal courts of appeals and state courts that have considered the question are in hopeless conflict with respect to those fees, and the need for clarification and settlement of the issue by this Court is manifest. The petition should be granted so that this evident need can be met. *At the very least,* action on the petition should be postponed until the guidance inherent in the plenary consideration of *Hudson v. Chicago Teachers Union* is available. *See also Abernathy v. San Jose Teachers Association, supra; Kramer v.*

Board of Education of the Town of Boonton, supra.[10]

II. Review By This Court Is Necessary To Settle Vital Constitutional Questions Concerning The Scope Of The Due Process Protections Which Must Be Provided To Agency Fee Payors. The Decisions Of The Lower Courts Are Hopelessly Divided Over This Issue.

In its decision below, the Sixth Circuit purported to rely upon this Court's decisions in *Ellis v. BRAC, supra*, and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in holding that predeprivation procedures were not constitutionally required to secure the rights of dissenting agency fee payors. However, neither *Ellis* nor *Abood* dealt directly with these due process issues. In his concurring opinion in *Abood*, Justice Stevens emphasized that this Court's disposition of the *Abood* case did not address the due process issues raised by a case such as the instant one.

> By joining the opinion of the Court, including its discussion of possible remedies, I do not imply—nor do I understand the Court to imply—that the remedies described in *Machinists v. Street*, 367 U.S. 740, and *Railway Clerks v. Allen*, 373 U.S. 113, would necessarily be adequate in this case or any other case. More specifically, the Court's opinion does not foreclose the argument that the Union should not be

[10] Even the court of appeals below apparently recognized the conflicting state of law, because it took the unusual step of staying the mandate in this case so that petitioners could file the instant petition. *See* Appendix E; *see also* FRAP 41; Sixth Circuit Rule 15.

> permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.

Abood, supra, 431 U.S. at 244 (Stevens, J., concurring).

The issue anticipated by Justice Stevens—whether the First Amendment and the due process clause require a public employer (and a union) to provide predeprivation procedures to protect the agency fee payor—is presented by the instant case and many others in the lower courts. The various lower court decisions have been in hopeless conflict.

For instance, many lower courts have required that stringent procedural protections be in place prior to allowing a dissenting nonmember's money to be taken from him and given to a union. *See, e.g., Ball v. City of Detroit*, 84 Mich. App. 383, 269 N.W.2d 607 (1978), where the court stated:

> [W]e agree with the plaintiffs that allowing the union the use of funds prior to a judicial determination subjects nonmembers to the risk that their fees may be used, even temporarily, for activities to which they are opposed. Because fundamental First Amendment rights are at stake, we believe the proper solution is to require nonmembers to pay service fees into an escrow account. While we recognize this works somewhat of a hardship on the union because temporarily it will be unable to collect even the portion of service fees to which it is entitled, that hardship is outweighed by the possibility that First Amendment rights will be violated.

Id., 84 Mich. App. at 397, 269 N.W.2d at 613.

Ball was followed by courts in other jurisdictions. *Robinson v. New Jersey*, 547 F. Supp. 1297, 1321-22 (D.N.J. 1982) (granting preliminary injunction), *further proceedings*, 565 F. Supp. 942, 948-49 (D.N.J. 1983), *rev'd*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 1228 (1985); *School Committee of Greenfield v. Greenfield Education Association*, *supra*; *see also Galda v. Bloustein*, 686 F.2d 159, 167-69 (3d Cir. 1982); *Romany v. Colegio de Abogados de Puerto Rico*, 742 F.2d 32, 44 (1st Cir. 1984). In suits to collect agency fees, other courts have required the union to prove its collective bargaining costs. *University of Connecticut Chapter, AAUP v. Dombrowski*, 38 Conn. Supp. 629, 458 A.2d 700 (1983).

However, some lower courts saw no constitutional defect in permitting unions to use agency-shop provisions as a means of obtaining forced loans to subsidize their political and ideological activities unrelated to collective bargaining. Cases holding that a postdeprivation refund is an adequate remedy include: *Abernathy v. San Jose Teachers Association*, *supra*; *Toledo Federation of Teachers v. Gibney*, No. L-83-303 (Ohio Ct. App., Feb. 3, 1984), *appeal dismissed*, ____ U.S. ____, 105 S. Ct. 498 (1984); *White Cloud Education Association v. White Cloud Board of Education*, 101 Mich. App. 309, 300 N.W.2d 551 (1980), *appeal dismissed sub nom. Jibson v. White Cloud Education Association*, ____ U.S. ____, 105 S. Ct. 236 (1984); *Kempner v. Local 2077, State, County and Municipal Employees*, 126 Mich. App. 452, 459-61, 337 N.W.2d 354, 357-58 (1983), *appeal dismissed*, ____ U.S. ____, 105 S. Ct. 316 (1984); and, most signifi-

cantly, *Ellis v. BRAC*, 685 F.2d 1065, 1069-70 (9th Cir. 1982), *rev'd in pertinent part*, ____ U.S. ____, 104 S. Ct. 1883 (1984); *cf. Central Michigan University Faculty Association v. Stengren*, ____ Mich. App. ____, 370 N.W.2d 383 (1985) (union-controlled internal rebate procedure is unconstitutional); *Hudson v. Chicago Teachers Union*, *supra* (union-controlled internal rebate procedure is unconstitutional).[11]

It was within the context of this morass of conflicting decisions that this Court issued its decision in *Ellis v.*

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[11] If this Court's summary dispositions in *Gibney v. Toledo Federation of Teachers*, *supra*, *Kempner v. Local 2077*, *supra*, and *Jibson v. White Cloud*, *supra*, can be read as approving a requirement that individuals must resort to a forum provided and run by their adversaries in order to vindicate their constitutional rights, those decisions are either erroneous or they have overruled, *sub silentio*, a long line of contrary holdings. *See*, *e.g.*, *In re Murchison*, 349 U.S. 133 (1955). Summary dispositions of appeals by this Court "have considerably less precedential value than an opinion on the merits." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979). A summary affirmance or dismissal for want of a substantial federal question is precedent only "on the precise issues presented" by "the particular facts involved" in a case; it does not indicate acceptance of the reasoning of the lower court's decision. *Mandel v. Bradley*, 432 U.S. 173, 175-77 (1977); *accord Illinois State Board*, 440 U.S. at 182-83.

This Court has never given plenary consideration to the issue of the constitutionality of a state-imposed requirement that non-union employees utilize a postdeprivation intra-union procedure as a prerequisite to judicial protection from the union's use of their compulsory service fees for unconstitutional purposes. This Court's decision in *Ellis* seriously undercuts the reasoning of the lower courts in *Gibney*, *Kempner* and *White Cloud*. Therefore, those unexplicated summary dispositions should not be read as a renunciation of fundamental doctrines of due process previously announced in other cases after full argument, and they "should not be understood as breaking new ground." *Mandel*, 432 U.S. at 176. In any event, this Court is certainly not bound by those summary dispositions, particularly in light of its plenary consideration of *Hudson v. Chicago Teachers Union*, *supra*.

BRAC, *supra*. In discussing the issue of the validity of a rebate scheme, this Court's opinion in *Ellis* first stated that the opinions in *Abood*, *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Clerks v. Allen*, 373 U.S. 113 (1963), "did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies. Doing so now, we hold that the pure rebate approach is inadequate." *Ellis*, 104 S. Ct. at 1889-90 (footnote omitted). The Court then explained its reasoning for this holding:

> By *exacting* and using full dues, then refunding months later the portion that it was not allowed to *exact* in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which employee objects.
>
> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. *Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. A rebate scheme reduces but does not eliminate the statutory violation.*

Id., at 1890 (emphasis added).

Thus, the Sixth Circuit's decision below cannot be reconciled with *Ellis* and *Abood*. The court of appeals decision ignored the finding by the district court that the TPPA rebate procedure does not fully protect the employees from having their money wrongfully used.[12] Thus, the judgment below effectively permits the union to use dissenters' fees for political and ideological purposes and requires the employees to utilize the union's internal remedy as a prerequisite to judicial relief. *Abood* prohibits the first result and *Ellis* prohibits the second. *See also Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).[13]

Finally, the judgment below also conflicts with this Court's most recent pronouncements concerning the requirements of procedural due process, particularly *Hudson v. Palmer*, ____ U.S. ____, 104 S. Ct. 3194 (1984). *See also Cleveland Board of Education v. Loudermill*, 470 U.S. ____, 105 S. Ct. 1487 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Hudson*

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[12] Again, it must be reiterated that despite the decisions upholding the validity of the Toledo ordinance and the TPPA rebate procedure, the district court clearly found that:

> It is possible that the annual refund will, in some years, exceed the amount allocated to the escrow fund. In such years, the TPPA will have been able to use the excess amount for activities which are not germane to collective bargaining, including political purposes.

(See Appendix C.)

[13] In *Patsy v. Florida Board of Regents*, *supra*, this Court held that exhaustion of administrative remedies is not required under 42 U.S.C. § 1983 before constitutional issues are ripe for decision. This rule is particularly applicable here because, as discussed *infra*, the challenged internal union rebate procedure does not reasonably insure that the nonmembers' money will not be used for political and ideological causes.

v. Palmer, *supra*, this Court faced the issue of whether the destruction of a prison inmate's property constituted an unlawful deprivation in violation of the due process clause. The Court stated that where a taking of property is occasioned by a *random, unauthorized* act of a state employee, postdeprivation remedial procedures will satisfy the due process clause because the state cannot predict when the loss will occur. However, the Court specifically held that "postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action." *Hudson v. Palmer*, *supra*, 104 S. Ct. at 3203. "The controlling inquiry is solely whether the State is in a position to provide for predeprivation process." *Id.*, 104 S. Ct. at 3204. Thus, this Court has clearly indicated that where a state authorizes the taking of property and can predict when those deprivations will occur, it must provide predeprivation procedures.

In the instant case, it is obvious that the City of Toledo has created and authorized a system of takings of the agency fees. The city is in a clear position to provide predeprivation safeguards. However, the City of Toledo has shirked this constitutional duty, and is attempting to rely solely upon the union's postdeprivation rebate procedure as the sole method of "remedying" petitioners' injuries. It must do more, however, under this Court's ruling in *Hudson v. Palmer*, *supra*. By upholding the Toledo ordinance, both the district court and the court of appeals below have, without question, failed to follow this Court's most recent line of procedural due process cases.

CONCLUSION

For the reasons stated herein, the Court should grant this petition for a writ of certiorari to consider more fully the crucial constitutional issues raised *infra*. At the very least, the Court should stay consideration of this petition until it renders a decision in *Hudson v. Chicago Teachers Union, supra*.[14]

Respectfully submitted,

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[14] See also *Abernathy v. San Jose Teachers Association, supra*, and *Kramer v. Board of Education of the Town of Boonton, supra*, both of which are also pending before this Court on petitions for writs of certiorari.

APPENDICES

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

January 14, 1986

NOT FOR PUBLICATION

Nos. 85-3016 & 85-3290

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES TIERNEY; PATSY R. WALLIANT [*sic*]; ULYSSES HOWARD; WILLIAM C. PARTON; JOHN H. COUSINO; JAMES E. JORDAN, SR.; ROBERT SPENCER; EDWIN SOMMERS; WILLIAM THOMPSON; ROBERT F. MITRO; MELVIN LYKOWSKI; JOSEPH P. MARTIN; DALE HOMER; DALE SIEFKE; JAMES R. PORTER, SR.; PATRICK ALLEN,

Plaintiffs-Appellants,

v.

CITY OF TOLEDO; DOUG DeGOOD, GENE COOK, BILL COPELAND, ALICE A. LYCZKOWSKI, RAY NIES, DONNA OWENS, LEO PUCETTI, MAX REDDISH, PETER UJVAGI, LARRY BREWER, DAVID BOSTON, WILLIAM A. DUNN, individually and in their official capacities; TOLEDO POLICE PATROLMAN'S ASSOCIATION, LOCAL 10,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Ohio.

Filed: January 14, 1986

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominently* displayed if this decision is reproduced.

Before: ENGEL and MILBURN, Circuit Judges; and WOODS, District Judge.*

PER CURIAM. Appellants, who are present and former police officers and patrolmen employed by the City of Toledo, appeal the judgment entered in the United States District Court for the Northern District of Ohio granting summary judgment against them on their claim brought pursuant to 42 U.S.C. § 1983. The complaint alleged that a Toledo ordinance passed in 1983 authorizing the police patrolman's union to operate as an agency shop deprives them of freedom of speech, freedom of association and due process of law.

The ordinance at issue, Toledo Municipal Code § 2129.97 (1983), requires all patrolmen who are not members of the Toledo Police Patrolman's Association (TPPA) to pay a service fee to the TPPA. The plaintiffs in the case are not TPPA members. Plaintiffs filed a motion for a preliminary injunction along with their complaint seeking a declaration that § 2129.97 violates the First and Fourteenth Amendments, and also seeking to enjoin defendants from enforcing it. Plaintiffs alleged that the ordinance requires each police patrolman to pay fees to the TPPA whether or not the individual chooses to join or become associated with it, and that this requirement

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* The Honorable George E. Woods, United States District Court for the Eastern District of Michigan, sitting by designation.

operates to ". . . coerce monetary and other support for ideological causes to which plaintiffs are opposed . . . . These acts also restrain and abridge plaintiffs' ability to support their own views and causes." Complaint, at 4.

All parties consented to referring this case to a United States magistrate for the purpose of conducting all proceedings and entering judgment pursuant to 28 U.S.C. § 626. On August 2, 1984, Magistrate James G. Carr issued a Memorandum and Order denying plaintiffs' motion for preliminary injunction. Subsequently, the TPPA filed suit in Toledo Municipal Court for collection of the agency fees. Plaintiffs in this case then filed a motion in the district court to enjoin the TPPA from pursuing its state claim until all pending matters in the federal litigation were resolved. On December 11, 1984, Magistrate Carr denied this second motion for injunctive relief. Plaintiffs have appealed the denial of their second motion for preliminary injunction, which appeal has been docketed as No. 85-3016.

While that appeal was pending, Magistrate Carr considered the merits of plaintiffs' claims and on March 26, 1985, he granted defendants' motion for summary judgment and dismissed the case. Plaintiffs also appeal the entry of judgment against them, which appeal has been docketed as No. 85-3290. Both appeals in this case have been consolidated for purposes of review by this court.

On appeal, the appellants raise several issues. Essential to each, though, is whether the district court was correct in ruling that § 2129.97 of Toledo's Municipal Code is constitutionally valid under *Ellis v. Brotherhood of Railway Clerks*, ____ U.S. ____, 104 S. Ct. 1883 (1984), *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977),

and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

Upon a review of the challenged Toledo city ordinance and of the agency shop rebate procedure addressed by the TPPA, Local 10, we are of the opinion that in the main they comport with the initial procedures which have been held to satisfy due process in the reported decisions as above cited. In so holding, we recognize that the plaintiffs have not as yet been permitted any extensive discovery which might ultimately bear upon whether the ordinance and plan will pass constitutional muster when they are in fact applied for those procedures are as yet untested and, though appearing fair, have not been adequately invoked. While there is a potential conflict in some of the language of section 2129.97(b) of the ordinance and the procedures spelled out in the agency shop rebate procedure,[1] it is sufficient at this time for the

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[1] For instance, these two documents define the amount of rebatable funds differently. Section 2129.97(b) states that the TPPA must establish a procedure through which non-members, such as the plaintiffs here, shall recover "any portion of the annual fee which is expended for activities or causes of a political nature or involving controversial issues of a public importance only incidentally related to wages, hours and conditions of employment." The rebate procedure implemented pursuant to the ordinance states in the second of three paragraphs that the impartial umpire shall determine the amount to be refunded at the end of the first, year, and rebate that amount from the escrowed funds. This percentage is defined in the separate rebate procedure document as "that amount of fees used [by the MPPA] [*sic*] to support partisan politics or ideological causes not germain [sic] to the work or policy of the [TPPA] in the realm of collective bargaining."

The definition of the amount of rebatable funds, the so-called Abood amount, as set forth in the ordinance and the rebate plan are not congruent. In all events, however, the constitutionally required amount is that defined by the Supreme Court:

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of

court to note the union's recognition that those procedures and the procedures for the performing of the duties of the fee umpire and arbitrator are to be guided and controlled by the decisions of the United States Supreme Court in *Abood v. Detroit Board of Education*, *supra*, and other Supreme Court authority building upon those issues. Therefore, any conflicts which might otherwise cause us concern can be resolved by reference to those decisions and a careful observance by all parties of the particulars of the plan as interpreted in the light of those decisions.

We do not perceive that due process requires us to anticipate issues which have not yet arisen or become ripe for decision and, of course, plaintiffs are not foreclosed from further postjudgment proceedings in the district court, should such problems arise. We particularly note that neither the district court's acceptance of the plan, or the affirmance of it, nor any decision by the arbitrator or impartial umpire has precluded plaintiffs from challenging the propriety of the determination of such arbitrator or umpire as to its constitutional sufficiency. It is the sense of the reported case law in this

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> performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Ellis, *supra*, 104 S. Ct. at 1892.

area that the plan should be given a fair opportunity to operate according to its terms before further complaint may properly be made of it.

AFFIRMED.

APPENDIX B

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO DENYING MOTION FOR PRELIMINARY INJUNCTION

December 11, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

James Tierney, et al.,
Plaintiffs

vs.

City of Toledo, et al.,
Defendants

C 83-430
Memorandum and Order
Filed:
December 11, 1984

This is a civil rights action challenging Toledo's agency shop agreement with its Police Patrolmans Association (TPPA). By prior order entered August 2, 1984, I denied the plaintiffs' motion for a preliminary injunction. That motion sought a declaration that the ordinance and procedures which had been established under the ordinance violated the plaintiffs' First Amendment and due process rights on their face.

Now pending for decision is a second motion for injunctive relief filed by the plaintiffs. This second motion seeks an Order from this Court restraining the TPPA from maintaining state court lawsuits to collect service fees until all pending matters in this litigation have been resolved. For the reasons which follow, and for the reasons previously expressed in my earlier Order, the plaintiffs' motion shall be denied.

Plaintiffs contend that payment of an amount equal to the dues assessed upon voluntary members of the TPPA constitutes a deprivation of property without due process of law, and derogates rights secured to them by the First Amendment. The plaintiffs have served notice upon the

Court that they will not abide by this Court's prior directive that, in order to challenge the rebate procedure, they must invoke that procedure before this Court can proceed with a further examination of their claims.

Between the time of my first Order and the instant motion, the principal authorities relied upon by each of the parties has been reversed by Courts of Appeal. Thus, a decision supportive of the plaintiffs, *Robinson v. State of New Jersey*, 547 F. Supp. 1297 (D. N.J. 1982), has been reversed by the Third Circuit, 713 [*sic*] F.2d 599 (3d Cir. 1984), and a bedrock of the defendants' contentions regarding the earlier motion, *Hudson v. Chicago Teachers Union Local No. 1*, 573 F. Supp. 1505 (N.D. Ill. 1983), has been undercut by the Seventh Circuit. 743 F.2d 1187 (7th Cir. 1984).

These events, and the opinions which have resulted, make clear the substantial diversity of views on the issues raised by the plaintiffs' two motions for injunctive relief. Though the occasions for the motions differ, the issues are substantially the same: namely, whether the agency shop arrangement leads to a deprivation of the plaintiffs' First Amendment and due process rights.

The plaintiffs argue, and the defendants do not dispute, that workers cannot be compelled, through the medium of involuntary union dues assessments, to support causes in which they do not believe, or which are contrary to their own political or other beliefs. It is also clear, however, that no First Amendment violation occurs when an employee is compelled, despite his desire not to do so, to support a collective bargaining agent's efforts on behalf of himself and his fellow employees. *Hudson*, *supra*, 743 F.2d at 1190 (*citing Abood v. De-*

troit Board of Education, 431 U.S. 209 (1977).

The First Amendment contention focuses, therefore, upon the application of involuntarily collected dues from non-members of an agency shop to purposes which are not germane to the agent's collective bargaining efforts. Small amounts, obtained, in effect, as forced loans, could, in theory, be aggregated and used effectively by the union to obtain political results contrary to the wishes of the objecting employees whom it represents. In addition, as noted in *Hudson*, money taken by the union against the employee's will "is money not available to him to support other political activities." 743 F.2d at 1192.

The plaintiffs contend, therefore, that their First Amendment interests are adversely affected, at least arguably and potentially, when a union is able to acquire funds for political purposes against the will of the contributors. Those funds can, in the aggregate, have a significant impact in the political arena; and, their enforced acquisition leaves the individual with fewer resources and a lessened opportunity to have his own independent and individual voice heard.

As I understand the union's system for escrowing funds, it does not eliminate entirely all opportunity for the union to use some portion of the plaintiffs' contributions for a short period for political purposes. The amount to be escrowed annually is to be calculated on the basis of the amount refunded during the preceding year, plus five percent. The amounts not escrowed will be available to the union. Even though that amount, in any given year, will be less than the amount actually available to the union in the previous year (because of

the five percent factor), it is conceivable that on some occasions, the union will be able to use the dissenters' funds for political purposes. On the other hand, it is also equally likely that in some years the amounts expended on activities germane to collective bargaining will exceed the funds at the union's disposal, and that the following year's refund will be reduced accordingly.

At this stage of this litigation, it is not possible to assess the degree to which, despite the union's escrow provisions and the five percent "add-on," the union will be able to use some of the dissenters' funds for activities not germane to collective bargaining. This inability to calculate those amounts, or to predict those developments with a fine and certain precision does not, however, mean that the union's system contravenes the First Amendment.

In view of the "add-on" provision, the union has clearly sought to adopt a protective measure, without entirely depriving itself of the use of the dissenters' funds for proper purposes, which seeks to accommodate the dissenters' rights. There is absolutely no indication in this record of either the relative amounts under discussion (germane vs. non-germane), or of the degree to which political expenditures by the union are subject to fluctuation from year to year. There is, therefore, no reason to believe that the escrow provisions as established by the union are not adequate, as a general proposition, to avoid the use of the dissenters' contributions for political or similar purposes. And the union's system also seeks to accomplish its objective of ensuring that the union will have adequate funds on hand to fulfill those obligations which are clearly germane to its activities on behalf

of all employees. In its effort to preserve the First Amendment rights of the dissenters from unfair or unwarranted encroachment, this court should also seek to avoid impinging upon the legitimate interests of the union's voluntary members. Such impingement would occur if funds which the union needs to accomplish its collective bargaining functions were sequestered *in toto*.

The plaintiffs' second concern—that they lose the use of funds which otherwise could be spent to further their preferred views—is, in my opinion, of de minimus significance. Whatever the amount of the annual escrow, those funds will, upon year-end computation, return to the dissenter as collection for the ensuing year commences. When that occurs, the dissenters will have the rebated funds in hand to expend for any desired political or other purpose. There is, therefore, a "roll-over" effect which offsets the impact of the deductions which will be occurring in the subsequent year. In effect, the objecting employees' loss of the use of their money as a result of the escrow arrangements occurs only once.

To be sure, the amounts expended for non-germane activities may fluctuate from year to year. But, on the whole, even when such fluctuation is, in relative terms, rather large, the overall impact is fairly slight. The most major effect upon the resources available to the plaintiffs will have occurred in the first year; thereafter, that impact is reduced by the funds made available to the plaintiffs through the rebate and refund process. And it should be noted that in that first year the union has not had access to any of the monies.

This impact, though from plaintiffs' perspective an undesirable circumstance, does not appear to me to repre-

sent an unconstitutional consequence. At this point in the development of the issues in this case, I am persuaded that its ultimate outcome is more likely to be similar to that of the Third Circuit in *Robinson*, rather than that of the Seventh Circuit in *Hudson*. As noted in *Robinson* on this issue, "[w]here the obstacle to free expression is the temporary deprivation of money, rather than prohibition of access to a forum, the Supreme Court has allowed far greater leeway to challenged . . . procedures." 741 F.2d at 611. In any event, the plaintiffs have not established a substantial likelihood that they will prevail on the merits of the First Amendment claim.

The plaintiffs' due process contention is that the defendant TPPA has not established procedures which ensure that they will recover the funds to which they are entitled. The principal contention made by the plaintiffs is that the union will control the outcome by its selection of the arbitrator, which, in the terms used in plaintiffs' original brief, will be simply "a non-neutral and partial internal administrative body."

At the oral argument on plaintiffs' first motion, defendants, through their attorney, agreed to remedy any defect in the arbitrator-selection process by eliminating any union involvement in such selection. As noted in my original Order, the existence of an impartial selection mechanism would appear to meet plaintiffs' objections; in addition, it would distinguish the instant situation from that presented in *Hudson*, in which the Seventh Circuit was vigorously critical of the fact that "the arbitrator is picked by the union," 743 F.2d at 1195, and that the procedure "from start to finish is entirely controlled by the union . . . " *Id.* at 1194.

The court in *Hudson*, like the plaintiffs in the instant case, questioned the competence of an arbitrator to resolve factual questions about what was and what was not germane to the union's collective bargaining activities. And both the Seventh Circuit and the plaintiffs assert that any decision in that regard by the arbitrator cannot be final, or deprive the plaintiffs of their right ultimately to secure judicial review.

I am not so quick to question either the impartiality or competence of arbitrators to resolve difficult factual issues in this area. One of the benefits of the arbitration process as it has developed in recent decades is that it substitutes more knowledgeable adjudicators for less expert judges. Moreover, the expense and delay required for an arbitrator to reach a decision are likely to be far less than would occur by routinely litigating the pertinent issues in either a state or federal judicial forum.

I am likewise unwilling to assume that arbitrators will reach decisions which will favor one party over the other, or that their results automatically will be unacceptable to either party. At the present time, the process has not been attempted; I am called upon, therefore, to attempt to assess that process and its likely outcome entirely in the abstract. In asking me to make this effort and to grant injunctive relief, the plaintiffs bear a heavy burden of showing the validity of their assumptions about the partiality of the arbitrator and the inadequacy of his or her determinations. They have not, in my opinion, done so.

Thus, although the arbitration process cannot have an estoppel effect upon the parties' disputes, considerations of policy support a result on the plaintiffs' motion which

encourages resort to the less formal, less expensive, and less time-consuming process, rather than bypassing that process on the basis of presumptions. To be sure, this dispute, or others like it, may well in time become the focus of judicial attention and review; but that review should be on the basis of a record, rather than speculation about what might possibly go wrong or be inadequate. This court views the prospect of impartial and good faith arbitration in the context of basic due process protections as its ally in the effort to resolve the disputes which exist between the parties.

In any event, with reference to neither the First Amendment nor the due process claims have the plaintiffs established that there is a substantial likelihood that they will prevail. Thus, they are not entitled to injunctive relief, and the defendant union can proceed to recover the amounts it believes owed to it without interference from this court.

Even if my conclusion about the impropriety of injunctive relief is in error, my authority to grant an injunction is, in my opinion, foreclosed by the Anti-Injunction Act (28 U.S.C. § 2283). That Act represents a legislative directive to federal courts to restrict their intrusion into the operation of state courts. In effect, the Act enjoins federal injunctions; its mandate can be avoided only where operation of the federal equity power is either authorized expressly by Congress or is essential to protect the federal court's jurisdiction or the integrity and validity of its judgments. 17 Wright & Miller, *Federal Practice and Procedure* § 4223 (1978).

In the instant case issuance of an injunction would be directly contrary to the statute. There is no express

authority to issue an injunction. Moreover, instead of protecting this Court's jurisdiction and effectuating its judgments, an injunction would impair the ability to resolve the dispute between the parties and frustrate the implementation of its original decision in this case.

In that decision, I sought deliberately, as I do here again, to cause the parties to pursue the rebate process. The purpose of that implicit directive was to enable further adjudication, if such is to occur, of the merits of the parties' divergent contentions in the context of tangible events and procedures, rather than in a setting of speculation and abstract doctrine.

To grant the relief now requested by the plaintiffs would frustrate the purpose and mandate of my earlier order. It would discourage recourse to the rebate process and leave the union without a remedy even to secure those funds which would be allocated to support clearly proper collective bargaining activities. That result would signal, in turn, an end to judicial ability to resolve the dispute between the parties. In that case the injunction—sought in the name of preserving jurisdiction—would have undercut my jurisdiction, as well as that of the state court.

Similarly, an injunction would defeat, rather than protect my original "judgment" (in the sense of decision or determination), as reflected in my Judgment Entry denying the plaintiffs' first motion. It was my determination at that time that the procedures instituted by the TPPA should be pursued. That approach diminished unnecessary judicial intrusion at the outset, while maintaining the possibility of ultimate judicial review by either the state or federal judiciary. If I were to grant injunctive

relief now, that determination (that the rebate process should have an opportunity to occur) would be permanently frustrated.

These consequences clearly conflict with the spirit of the Anti-Injunction Act, if not its letter. Moreover, those consequences are contrary to common sense, which continues to urge that the plaintiffs be encouraged to pursue the rebate process. Only in this manner can plaintiffs' challenge to the rebate process be fairly tested in practice and ultimately evaluated.

CONCLUSION

The plaintiffs' second motion for injunctive relief is, ultimately in fact if not in law, a request that I reconsider my original decision on their first motion. The only change which has occurred in the parties' positions is that the union has undertaken to collect monies apparently owed to it by one (and perhaps more) of the plaintiffs. On its face, this single new development is insufficient to entitle the plaintiffs to the reconsideration of my earlier position which their pending motion calls for.

Nonetheless, in view of the recent decisions by the Third and Seventh Circuit, I have reconsidered the parties' positions in detail, in an effort to ensure myself that the result which I initially reached was, on balance, correct. My purpose in doing so was to express clearly to the parties that I am aware of the importance of the issues raised by this litigation to all concerned.

Upon such reconsideration, I have determined, for the reasons expressed herein and in my original Order, that the plaintiffs are not likely to prevail upon their claims

that the escrow/rebate provisions of the union's agency shop arrangement insufficiently protect their First Amendment and due process rights. The harm which they endure is not irreparable, and the public interest in collective bargaining and related agreements and arrangements which are workable is substantial. It is clear, in my opinion, that an injunction should not issue, particularly in light of the Anti-Injunction Act.

It is, therefore,

ORDERED THAT plaintiffs' motion for injunctive relief be denied.

SO ORDERED.

/s/

United States Magistrate

APPENDIX C

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO GRANTING MOTION FOR SUMMARY JUDGMENT

March 26, 1985

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OHIO
WESTERN DIVISION

James Tierney, et al.,

Plaintiffs

v.

City of Toledo, et al.,

Defendants

C 83-430
Memorandum &
Order

Filed:
March 26, 1985

This is a civil rights action in which the parties have consented to the entry of judgment by the undersigned. Pending for decision are cross-motions for summary judgment.

For the reasons which follow, I find that there are no disputed issues of material fact, and I conclude that the defendants are entitled to judgment as a matter of law.

BACKGROUND

In March, 1983, the City of Toledo adopted an Ordinance which established an agency shop for its police patrolmen, and recognized the Toledo Police Patrolmen's Association (TPPA) as their collective bargaining representative. Under the Ordinance, those patrolmen who are not voluntary members of the TPPA must pay a monthly service fee in an amount equal to the dues of the members.

For the first year of the operation of the Ordinance and collective bargaining agreement, 100 percent of that service fee has been placed in escrow, so that no part of those funds are available to the union. At the conclusion of that year, a determination will be made by an arbitrator appointed by an outside source as to the percentage of the escrowed funds which reflect the costs incurred by the TPPA in engaging in activities germane to its collective bargaining obligations to all patrolmen, regardless of union affiliation or lack thereof. Those funds will be paid over to the union, while the balance, representing that portion of the agency fee which would have contributed to activities which are not germane to collective bargaining, is refunded to the nonmembers.

At that point, and thereafter on an annual basis, the nonmembers are required to continue to pay the monthly service fee. Only a portion of those payments are, however, escrowed. The amount to be escrowed is calculated on the basis of the past year's refund plus five percent. At the conclusion of the year, the arbitrator ascertains the percentage of the escrow which represents expenditures for activities not germane to collective bargaining, and an appropriate refund is made. If that amount exceeds the escrow, the nonmember is repaid directly by the union.

The plaintiffs are City of Toledo patrolmen who are not members of the TPPA. They contend that the agency shop Ordinance and the procedures which have been established, as outlined above, violate their First Amendment rights, and their right to due process of law. They also claim that the Ordinance is vague and overbroad, and, as well, that the City does not have the law-

ful authority to adopt the agency shop/collective bargaining Ordinance.

The named plaintiff Tierney has refused to pay the service fee. As a result, collection proceedings were undertaken by the TPPA in the Toledo Municipal Court. In an effort to halt these proceedings, and to relieve the non-members of the obligation of making payments of the service fees under the Ordinance, plaintiffs have twice sought injunctive relief in this court. Each of their motions for preliminary injunction has been denied. Memorandum & Order, August 2, 1984; Memorandum & Order, December 11, 1984.

Though encouraged to do so in those decisions, the plaintiffs have elected to refuse to pursue the procedures which have been established to determine the amount of the refund to which they may have been entitled at the conclusion of the first year of the agency shop's operation.

FACTUAL FINDINGS

The following factual findings reflect either undisputed facts or inferences drawn from predicate facts which are undisputed.

1. Under the Ordinance, all patrolmen are required to contribute to the expenses incurred by the TPPA in its collective bargaining activities.

2. The TPPA has, under the aegis of the Ordinance, established an escrow/rebate procedure, whereby nonmembers pay a monthly service fee in an amount equal to 100 percent of the voluntary members' dues.

3. For the first year of the agency shop's operation, the entire amount of the service fee has been placed in escrow, and has not been available to the TPPA for any use or purpose.

4. At the conclusion of that year, an independent arbitrator will be selected to ascertain the amount of the escrowed funds which are allocable to the expenses incurred in collective bargaining.

5. Though paid for by the union, the arbitrator will not be selected by or otherwise subject to the TPPA.

6. Upon computation of the amount of the agency fee to be refunded after the first year, that amount will be rebated to the nonmembers, with interest.

7. After the first year, and on an annual basis thereafter, a portion of the nonmember's agency fee will be paid into an escrow account to be held until the refund calculation at the end of that period.

8. The amount of the escrow fund will be determined on the basis of the prior year's refund, plus five percent.

9. It is possible that the annual refund will, in some years, exceed the amount allocated to the escrow fund.

10. In such years, the TPPA will have been able to use the excess amount for activities which are not germane to collective bargaining, including political purposes.

11. The amount of that possible excess, when and if it occurs, will be de minimius.

12. That de minimus amount will not enhance the union's ability to have its views and positions prevail in the political arena or other areas not germane to collective bargaining.

13. That de minimus amount will not inhibit the ability of nonmembers, from whom that excess has been collected, to support political causes of their choice, or otherwise exercise their First Amendment rights fully.

14. The ability of the nonmembers to exercise their political and other First Amendment rights is not impaired by the fact that they will have funds escrowed under the agency shop escrow/rebate procedure for up to twelve months, because they will have obtained, at the outset of each such twelve month period, a refund from the preceding year which will be substantially equivalent to the funds being contributed on a monthly basis thereafter.

15. The method employed by the TPPA to calculate the amount of the agency fee to be escrowed in anticipation of later repayment, with interest, is a reasonable means of safeguarding the nonmembers' First Amendment rights and enabling the union to fulfill its collective bargaining obligations on behalf of all the patrolmen whom it represents.

16. The process for calculating the amount of the annual refund gives the nonmembers notice and an opportunity to be heard before an impartial

arbitrator, at which time the TPPA will have the burden of establishing the amounts it expended on collective bargaining, contract administration, and grievance adjustment.

17. The operation of the escrow/rebate process does not curtail the right of nonmembers to seek judicial redress for any actionable claim which they may have regarding the impact of the agency shop and the service fee upon their constitutional and other legal rights.

CONCLUSIONS OF LAW

The legal principles applicable to this dispute have been discussed in some detail in my earlier opinions in this case, and, upon further consideration, I find that they are still controlling.

I conclude that the Supreme Court's decisions in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Ellis v. BRAC*, ____ U.S. ____, 104 S. Ct. 1799 (1984), reflect an imprimature [*sic*] of approval for the procedures established by the union in this case. In *Abood* the Court upheld an agency shop between a public employer and a public employees' union; in addition, the Court acknowledged the obligation of nonmembers to contribute to the costs of conducting collective bargaining and related activities which redounded to the benefits of all employees, regardless of union affiliation, or lack thereof.

In *Ellis*, to be sure, the Court rejected a so-called pure rebate program (which could more properly be called a simple rebate), whereby nonmembers were compelled to

pay the service fee directly to the union, which then had unlimited use of the funds until a refund was made of the funds which had been allocated to matters which were not germane to collective bargaining. Such unlimited use of what was, in effect, a forced loan, contravened the nonmembers' First Amendment rights.

This case does not reflect a similar approach on the part of the union. Rather than the simple rebate, the TPPA escrow funds which have been calculated in a reasonable manner as probably not being required for collective bargaining purposes. During the period in which those funds are in escrow, they are not available to the union for any purpose. This procedure incorporates one of the options suggested by the Court in *Ellis*. ____ U.S. at ____, 104 S. Ct. at 1890.

Similarly, the defects in agency shop procedures invalidated in *Hudson v. CTU Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), are not found in the TPPA procedures. In *Hudson* there was neither the effort to make a reasonable calculation of the funds which would be required for collective bargaining purposes nor an escrow arrangement. In addition, the arbitrator who adjudicated disputes between the parties was chosen by the union, rather than independently, as will occur in this case.

To be sure, there is the possibility in this case that there may in some years be occasions when the union will have had some excess funds for a brief period of time at its disposal. But, as I have found, even accepting that possibility, it will have an utterly de minimus impact upon the First Amendment issues at stake in this controversy.

On balance, therefore, I remain persuaded that the decision in this case, with reference to the First Amendment and due process validity of the TPPA escrow/rebate procedures, should be controlled by the Third Circuit's decision in *Robinson v. State of New Jersey*, 741 F.2d 598 (3d Cir. 1984), rather than the Seventh Circuit's decision in *Hudson*. A decision in this case in favor of the union's procedures represents, in my opinion, a more correct assessment of the legitimacy of the agency shop arrangement in light of *Abood* and *Ellis* than would a determination that those procedures and that arrangement violated either the First Amendment or due process of law.

With regard to the two other issues raised by the plaintiffs, I find that the Ordinance which created the agency shop is neither vague nor overbroad and that the City was acting within the lawful scope of this authority as a municipality when it adopted that enactment.

CONCLUSION

In light of the foregoing, I find that there is no dispute as to any material issue of fact, and I conclude that, as a matter of law, the defendants are entitled to summary judgment. It is, therefore,

ORDERED THAT the motion of the plaintiffs for summary judgment be denied, and that the motion of the defendants for summary judgment be granted.

So ordered.

The Clerk shall prepare an entry of judgment accordingly.

/s/

United States Magistrate

APPENDIX D

RELEVANT CONSTITUTIONAL PROVISIONS, 42 U.S.C. § 1983, TOLEDO MUNICIPAL CODE § 2129.97 and TOLEDO POLICE PATROLMEN'S ASSOCIATION REBATE PROCEDURE

UNITED STATES CONSTITUTION
AMENDMENT I.

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION
AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983.

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

TOLEDO MUNICIPAL CODE § 2129.97

Agency Shop, Payroll Deductions and Dues Checkoff.

(a) In recognition of the Toledo Police Patrolman's Association's services to the bargaining unit and the Toledo Police Patrolman's Association's role in helping develop a more harmonious and stable labor relationship between the bargaining unit employees and the City, employees within the bargaining unit, within thirty (30) days of the effective date of this ordinance, or their date of hire, whichever is later, shall either become members of the Toledo Police Patrolman's Association or share in the financial support of the Toledo Police Patrolman's Association (TPPA) by paying to the TPPA a service fee not to exceed the amount of dues uniformly required of members of the TPPA.

(b) The TPPA shall notify non-members of their obligation to pay service fees and such notification will include the procedures for payroll deductions and direct cash payments. The TPPA must provide a procedure for non-members to recover any portion of the annual fee which is expended for activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours and conditions of employment.

(c) The City shall deduct current TPPA dues, initiation fees and equal assessments and service fees from the paychecks of employees within the bargaining unit as set forth in the recognition clause who have signed the proper authorization cards, authorizing such deductions from the paychecks of the employee. Such deduction shall be made from the first paycheck of the month for which current dues, initiation fees, equal assessments or service fees (each payable in advance) are due the TPPA.

(d) The City shall remit to the Secretary-Treasurer of the TPPA, dues, service fees, initiation fees, or equal assessments so deducted from the paychecks of the employees covered herein before the fifteenth (15th) day of that month. The City shall provide at reasonable intervals upon request by the TPPA, a list of those members and non-members on payroll deductions.

(e) Nonpayment of service fees, initiation fees, dues or other equal assessments may be pursued by the Union at its option through collection or other remedies permissible under Ohio law. The City will deduct any arrears in unpaid TPPA dues, service fees, initiation fees, and equal assessments owed to the TPPA, if and only if, the City has made an error in failing to deduct such dues, fees or equal assessments during a former payroll period, or if the City receives a court ordered garnishment of wages for such fees or other court order requiring the same.

(f) Payment of dues or service fees shall not be a condition of continued employment.

(g) The Union shall indemnify and save the City harmless against any liability that may arise out of, or by reason of, any actions taken by the City for the purpose of

complying with the provisions of this Agency Shop Ordinance. In the event that the City is held to be responsible for the repayment of monies paid to the TPPA pursuant to this Agency Shop Ordinance, the TPPA to the extent of those funds actually received, shall reimburse same to the City and/or the designated employees involved.

(h) If any provision of this Section is invalid under Federal or State law, said provision shall be modified to comply with the requirements of said Federal or State law.

SECTION 2. That this ordinance, being an emergency measure, shall take effect and be in force from and after its passage. The reason for the emergency lies in the fact that this ordinance is necessary for the immediate preservation of the public peace, health, safety and property, and for the further reason that the passage of said ordinance will contribute substantially to the stability of the relationship between the City and its employees represented by the Toledo Police Patrolman's Association, Local 10.

TPPA AGENCY SHOP REBATE PROCEDURE

The agency shop refund procedure will operate in the following manner. In January of each year the dues payable by each member of the TPPA will be established. Those employees within the bargaining unit who do not wish to join the TPPA will pay an agency shop fee equal to 100% of the dues unless said employee objects by January 31st of each respective year to the payment of the agency shop fees for activities not germain [*sic*] to the collective bargaining process which are in support of

partisan political or ideological causes not germane to the work or purpose of the Toledo Police Patrolmen's Association in the realm of collective bargaining.

Those employees within the bargaining unit who object as set forth above shall have 100% of their fees placed in an escrow account pending a determination by an impartial umpire as to the amount to be rebated (which amount to be rebated shall be that amount of the fees used to support partisan politics or ideological causes not germain [*sic*] to the work or policy of the Toledo Police Patrolmen's Association in the realm of collective bargaining).

The same procedure will be followed in subsequent membership years except that the amount placed in escrow will be 5% greater than the amount determined by the umpire in the preceeding membership year to be rebated.

1983 Agency Shop Fees

1. Any person who has an objection to the payment of agency shop fees shall notify the Toledo Police Patrolmen's Association, 1947 Franklin Street, Toledo, Ohio 43624 by November 1, 1983 of his or her objections or is a plaintiff in *James Tierney, et al. v. City of Toledo, et al.*, case number C83-430 shall be considered those persons objections to the payment of agency shop fees which are used in support of partisan political or ideological causes not germane to the work of the TPPA or the policy of the TPPA in the realm of collective bargaining.

2. The agency shop fee shall be deposited in an escrow account at the Toledo Trust bank account number _____ which will pay a flat interest rate. Said fee shall be payable no later than the second pay period of each month. Those employees in arrears since the passage of the Toledo Municipal Code agency shop provision which was effective on April 1, 1983 shall immediately pay the full delinquency of the amount owed.

3. Within 14 days of the receipt of the objections as set forth in 1 above and implementation of this procedure, the dissenting fee payor shall receive a copy of

   (a) this refund procedure,

   (b) the 1983 Toledo Police Patrolmen's budget.

4. (a) Prior to the end of 1983 but no later than January 31, 1984 the TPPA will retain a member of the National Academy of Arbitrators, who is experienced in public sector labor relations, to serve as the agency shop fee Umpire and Arbitrator (hereinafter referred to as Umpire).

   (b) The Umpire will determine the percentage of the TPPA's total expenditures for said membership year that was expended in support of partisan political or ideological causes not germane to the work or policy of the TPPA in the realm of collective bargaining.

   (c) In making a determination as it relates to (a) and (b) above the Umpire will be guided and controlled by the decisions of the United States

Supreme Court in *Abood v. Detroit Board of Education* and any other United States Supreme Court decision which is controlling in the area.

(d) TPPA will provide the Umpire with copies of its budget for the 1983 membership year and such other documents as the Umpire deems relevant. The dissenting fee payor may submit written material to the Umpire relevant to the aforesaid determination by mailing such material to "Representation Fee Umpire, c/o Toledo Police Patrolmen's Association, 1947 Franklin Street, Toledo, Ohio 43624". The material will be timely if received by the TPPA prior to January 31, 1984.

(e) The Umpire will submit a written report to the TPPA which sets forth the percentage called for in (b) above with the appropriate explanation.

5. (a) Within three (3) weeks of the receipt of the umpire's written report by the TPPA, the TPPA will send a dissenting fee payor a check for the amount of the final refund appropriate for his or her bargaining unit, plus such interest as paid by the Toledo Trust Company on such amount, and a notice informing him or her how the refund was calculated, together with a copy of the Umpire's report.

(b) The final refund will be paid from a dissenting fee payors escrow account, and any money remaining in said accounts after such payment will be distributed to the TPPA.

Agency Shop Fees Paid In Membership Years Subsequent To 1983

1. The procedure set forth above provides the refund procedure to be utilized in subsequent years. However, present persons in the bargaining unit who object to the payment of agency shop fees will beginning on January 1, 1984 be required to object to payment of agency shop fees by January 31st of each respective year.

2. By February 15th of each year the TPPA will:

   (a) determine a preliminary refund which will be calculated by applying the percentages used to determine the final refund for the preceeding [*sic*] membership year to the membership dues for the membership year in question and adding an additional 5% of such amount to the dues amount which will be rebated.

   (b) establish at a bank in Toledo, Ohio a flat rate interest bearing escrow account and deposit in said account an amount as calculated in 2(a) above and send the dissenting fee payor a notice informing him or her as follows:

      (1) the amount of the refund that a preliminary determination indicates he or she is entitled to receive for the membership year in question and that this amount will be deposited in a flat rate interest bearing escrow account in a bank in Toledo, Ohio.

      (2) the basis for this determination together with a copy of the TPPA budget for the membership year in question and

(3) that a further communication regarding the amount of his or her refund will be sent after the end of the membership year in question.

3. After the end of the membership year in question the procedure set forth above regarding final refunds as provided for in sections (4) and (5) for the 1983 membership year will be followed provided that:

(a) references to dates in 1983 will refer to the same date in the year in question.

APPENDIX E

ORDER STAYING MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

January 28, 1986

No. 85-3016/85-3290

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES TIERNEY, ET AL.,

Plaintiffs-Appellants,

vs.

CITY OF TOLEDO, ET AL.,

Defendants-Appellees.

ORDER

FILED:
JANUARY 28, 1986

ORDER STAYING MANDATE

Upon consideration, it is ORDERED that the motion to stay issuance of the mandate pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed until the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. Section 2101 or Rule 20 of the Supreme Court Rules, as applicable. However, if within such time, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Upon the filing of a copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER
OF THE COURT
JOHN P. HEHMAN, CLERK

/s/

Supreme Court, U.S.
FILED
MAR 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1434

In the Supreme Court of the United States

October Term, 1985

JAMES TIERNEY, *et al.*,
Petitioners,

vs.

CITY OF TOLEDO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT TOLEDO POLICE PATROLMAN'S ASSOCIATION'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

1. Whether the agency shop fee rebate procedure established by the Toledo Police Patrolman's Association conforms to the constitutional parameters established by this Court for the protection of non-members' First and Fourteenth Amendment rights.

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No. 85-1434

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT TOLEDO POLICE PATROLMAN'S ASSOCIATION'S BRIEF IN OPPOSITION

The Respondent Toledo Police Patrolman's Association respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Sixth Circuit's opinion in this case. The Sixth Circuit's opinion, which was not designated for full text publication, is reproduced in Appendix A of the Petition for a Writ of Certiorari.

OPINIONS BELOW

The Respondent accepts the Petitioners' statement of the opinions below, but wishes to notify the Court that the District Court's initial denial of Petitioners' request for injunctive relief, which was not appealed, is reported at 116 LRRM 3475 (B.N.A. 1984).

JURISDICTION

The Respondent does not contest the statement of jurisdictional grounds set forth in the Petition for a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent does not contest the Petitioners' statement of relevant statutory provisions set forth in the Petition for a Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

The Respondent Toledo Police Patrolman's Association adopts by reference the findings of fact as set forth by the United States District Court for the Northern District of Ohio, Western Division in its Memorandum and Order of March 26, 1985. *See* Petition Appendix C. The pertinent facts can be simply stated. In March, 1983, Respondent City of Toledo enacted an ordinance establishing an agency shop and recognizing the Toledo Police Patrolman's Association (hereinafter referred to as the "TPPA"), as the sole and exclusive representative of To-

ledo police patrolmen. *See* Toledo Municipal Code §2129.97, reproduced in Petition Appendix D.[1] The Toledo ordinance mandates that all Toledo police patrolmen either become members of the TPPA or pay a service fee to the TPPA to defray the costs of collective bargaining activities. The amount of the service fee, by ordinance, may not exceed the amount TPPA members pay as dues. The ordinance further requires the establishment of a rebate procedure by which non-members may recover any portion of their service fees expended for controversial causes or activities of a political nature. Thus, under the Toledo ordinance, non-members are left to pay only the cost of the TPPA's activities on their behalf relevant to wages, hours and conditions of employment.

In fulfillment of the ordinance's rebate requirement, the TPPA established a comprehensive rebate procedure.[2] Simply stated, the TPPA rebate procedure provides for an independent arbitrator to ascertain the amount of service fees to be refunded. As reflected in the District Court's findings of fact, the TPPA will retain an independent arbitrator from the National Academy of Arbitrators, but will not play any role in the selection of the particular arbitrator.

The first year that the rebate procedure is in effect, non-members must pay an agency shop fee equal to one hundred percent (100%) of membership dues. The full one hundred percent (100%) of the agency shop fee must

---

1. Subsequent to the enactment of Toledo Municipal Code §2129.97, the Ohio legislature enacted comprehensive public employee bargaining legislation. *See* Ohio Revised Code §4117.01 *et seq.*

2. The rebate procedure is detailed in a September 27, 1983 affidavit of TPPA President, William A. Dunn, which was filed with the District Court. The Petitioner has included the substance of this affidavit in Petition Appendix D.

be placed in an interest bearing escrow account pending a determination by the impartial arbitrator as to the amount to be rebated. The amount of the rebate is that amount of the fees used to support partisan political activities or ideological causes "not germane to the work or policy of the Toledo Police Patrolman's Association in the realm of collective bargaining". *See* Petition Appendix D, at 30a. The difference between the ascertained amount of dues and the actual agency shop fee as determined by the arbitrator, will be refunded with interest to the non-members. In subsequent years the TPPA will escrow the amount of the prior year's rebate plus five percent (5%). Non-members will thereby avoid having to pay the full amount of member dues for the TPPA's immediate use. The TPPA is, in essence, denied access to the portion of non-member agency shop fees, plus five percent (5%), which would have been spent on political and/or ideological causes.

In determining the amount of the rebate, the TPPA has the burden of establishing, on an annual basis, the amounts expended on collective bargaining, contract administration, and grievance resolutions. The District Court noted that, while it was "possible" the annual refund might, in some years, exceed the amount of agency shop fees in escrow, any such excess would be *de minimis*. The District Court further found that such *de minimis* amounts would neither substantially advance the TPPA's political activities nor impair non-members' ability to support political causes of their own choice. Finally, under the Toledo ordinance, non-members are permitted to pursue judicial redress for any actionable claims arising out of the implementation of the TPPA rebate procedure.

The above-outlined rebate procedure was challenged by seventeen (17) non-member Toledo police patrolmen;

the Petitioners in the instant action. On May 12, 1983, the Petitioners filed suit in the United States District Court for the Northern District of Ohio, Western Division to enjoin the TPPA's collection of agency shop fees pursuant to Toledo Municipal Code §2129.97.[3] On August 2, 1984, the District Court denied the Petitioners' Motion for Preliminary Injunction. Shortly thereafter, the District Court stayed all proceedings pending implementation of the rebate procedure. The Petitioners failed to remit agency fees in compliance with this order, and notified the District Court of their refusal to do so. After giving notice, the TPPA initiated a suit in the Toledo Municipal Court for the collection of the Petitioners' nonmember agency fees (*TPPA v. Tierney,* CVE-84-15149). Petitioners unsuccessfully moved the District Court to enjoin the Municipal Court collection proceeding. The TPPA's Motion for Summary Judgment was granted by the District Court on March 26, 1985. *See* Petition Appendix C.

On January 14, 1986, the United States Court of Appeals for the Sixth Circuit affirmed both the District Court's second denial of injunctive relief to Petitioners and its award of summary judgment to the TPPA in a consolidated appeal. For the reasons that follow, the Petition for a Writ of Certiorari must be denied, and the January 14, 1986 affirmation of the United States Court of Appeals for the Sixth Circuit must stand.

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3. In its recent public bargaining legislation, the Ohio legislature has expressly authorized "the deduction of a fair share fee by the public employer from the payroll check of the employee . . . . [An] internal rebate procedure shall provide for a rebate of expenditures in support of partisan politics or ideological causes not germaine [sic] to the work of employee organizations in the realm of collective bargaining." *See* Ohio Revised Code §4117.09(C).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE REBATE PROCEDURE EMPLOYED BY THE RESPONDENT TOLEDO POLICE PATROLMAN'S ASSOCIATION CONFORMS TO THE STANDARDS FOR SUCH PROCEDURES SET FORTH IN THIS COURT'S RECENT DECISION IN CHICAGO TEACHERS UNION V. HUDSON.

The Petition for a Writ of Certiorari should be denied on the ground that the agency shop fee rebate procedure employed by the TPPA meets the three essential criteria for a valid rebate scheme set forth in this Court's recent opinion *Chicago Teachers Union, Local No. 1 v. Hudson*, 54 U.S.L.W. 4231 (March 4, 1986). The *Hudson* decision establishes the minimal constitutional requirements governing the proper collection of non-member agency fees. The three part test established by this Court calls for:

> adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

See 54 U.S.L.W. at 4236. The TPPA's rebate procedure conforms to the above requirements. Review of the decision below is therefore unnecessary.

With reference to the first element of the *Hudson* test, the TPPA's rebate procedure provides adequate explanation of the basis for the amount of agency fees elicited from non-members. The TPPA plan does not grant an arbitrary advance reduction for non-member dues, a practice which constituted one of the major flaws in the rebate

procedure employed by the union in the *Hudson* case. Unlike the union in *Hudson,* the TPPA escrows one hundred percent (100%) of non-member dues the first year in order that no portion of the non-member dues can be utilized until such time as a legitimate basis for the amount of the agency fee can be determined. At the conclusion of the first year, when adequate expense records have been compiled, the TPPA's rebate procedure requires that an independent arbitrator evaluate the year's expenditures to determine the amount of the rebate.[4] The following year, the amount of the previous year's rebate plus five percent (5%) is placed into escrow. Thus, no determination as to the actual amount of the agency shop fee is made until the Union has carried forth its burden of justifying the amount of the rebate before an impartial arbitrator.

In *Hudson,* this Court would not go so far as to hold that a one hundred percent (100%) escrow of non-member agency fees was "constitutionally required". This Court noted that:

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4. Petitioners have advanced the makeshift argument that "this Court has only empowered arbitrators to determine the 'law of the shop,' not the supreme constitutional law of the land." *See* Petition at 11. The arbitrator, of course, only determines the amount of the rebate as based upon the union's ability to carry forth its burden of establishing, through legitimate documentation, its entitlement to any portion of the non-member agency shop fees. In the context of the agency shop, this Court has held that " '[w]here an arbitral determination gives full consideration to an employee's [statutory or constitutional] rights, a court may properly accord it great weight.' " *See McDonald v. City of West Branch,* ___ U.S. ___, 104 S. Ct. 1799, 1804 n.13 (1984). The arbitrator does not decide issues of constitutional law. The constitutional parameters have been established, most recently, in this Court's affirmation of the Seventh Circuit's decision in *Hudson.* Once the internal union procedure has been found to comply with the requirements of this Court, the union "should be entitled to insist that the arbitration procedure be exhausted. . . ." *See* 54 U.S.L.W. at 4236 (White, *J.*, concurring).

> [s]uch a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain.

See 54 U.S.L.W. at 4236. The TPPA nonetheless denies itself access to any portion of the agency shop fees placed in escrow that first year, even though it is "unquestionably entitled" to some portion of the escrowed funds to help defray the costs of administering the collective bargaining agreement on behalf of the dissenting nonmembers. The TPPA foregoes its entitlement to any of the escrowed funds that first year in the interest of ensuring that the amounts in question can be adequately justified. Therefore, in subsequent years when the Union bases the escrowed amount on the previous year's rebate, the procedure will be in conformity with the following admonition contained in the *Hudson* opinion:

> If the Union chooses to escrow less than the entire amount . . . it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure itself must be independently verified.

See 54 U.S.L.W. at 4236, n.23.

Not only does the TPPA procedure tailor the amount placed in escrow to the amount of the previous year's rebate, an additional five percent (5%) protective "cushion" is added to the escrowed amount to minimize the risk that the current year's political expenditures could exceed the amount in escrow. By comparison, in *Hudson* the union officials themselves computed a five percent (5%) advance reduction in fees, which included only a four/tenths of one percent (.4%) "cushion" for improper calculation. The procedure for determining the amount

of the agency fee in *Hudson* was therefore arbitrary and provided dissenting non-members with virtually no protective margin for error. Further, in *Hudson* the computation of the fee was undertaken by the union officials themselves. The union officials in *Hudson* did not have the burden of justifying the amount of non-member agency fees before an independent fact finder. All of these factors serve to distinguish the rebate procedure employed in the *Hudson* case from the rebate procedure proposed by the TPPA. The basis for the fees utilized by the TPPA for the purposes of administering the collective bargaining agreement on behalf of dissenting non-members is therefore adequately justified, as required by the first element of the test set forth by this Court in *Hudson*.

With reference to the second element of the test set forth in *Hudson*, the TPPA procedure provides dissenters with a "reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker". *See* 54 U.S.L.W. at 4236. "The non-union employee", notes *Hudson*, "is entitled to have his objections addressed in an expeditious, fair, and objective manner". The TPPA procedure, in contrast to the Chicago Teachers Union's procedure, is not "from start to finish . . . entirely controlled by the union". *See* 54 U.S.L.W. at 4235, quoting 743 F.2d at 1194-1195. The TPPA procedure is further distinguishable from that of the Chicago Teachers Union in that the TPPA does not have unrestricted control over the choice of the arbitrator. As noted in the District Court's factual findings in granting summary judgment to the TPPA, "the arbitrator will not be selected by or otherwise subject to the TPPA". *See* Petition Appendix C.

The TPPA rebate procedure is also as expedient as possible, given the annual nature of the dues collection

process. For example, in the first membership year, objections to the payment of agency shop fees were to have been made by November 1, 1983.[5] Within fourteen (14) days of the receipt of the objection, the TPPA was required to have mailed the dissenting non-member a copy of the rebate procedure and a copy of the 1983 TPPA budget. No later than January 31, 1984 the TPPA was required to have retained a member of the National Academy of Arbitrators to determine the percentage of the TPPA's total expenditures in support of political or ideological causes for the 1983 membership year. Final rebate checks were to have been issued within three (3) weeks of the arbitrator's determination. Thus, in the first year of the procedure as drafted, when the full one hundred percent (100%) of the fees are escrowed, the time elapsed between the non-member's initial objection and the issuance of refund checks is relatively short.

In subsequent years the preliminary refund, consisting of the previous year's rebate plus five percent (5%) must be determined no later than two (2) weeks after the January 31st deadline for non-member objections. This preliminary amount is immediately placed into an interest bearing escrow account and, at the end of the membership year, is refunded with interest in the amount determined by the impartial arbitrator, and within three weeks of the arbitrator's determination. *See* Petition Appendix D.

The TPPA procedure is soundly based upon the membership year. This time frame is reasonable in view of the nature of the agency fee collection process. The first year of the rebate procedure, as drafted, involves a

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5. As no dues were paid into escrow, the rebate procedure was not implemented in 1983 and no arbitrator was retained by the TPPA.

somewhat shorter time frame as a result of the date upon which the ordinance authorizing the agency shop was enacted. In subsequent years dissenting non-members are given the opportunity to object within the first month of the membership year and are issued a notice of preliminary refund with a written explanation and a copy of the year's budget before February 15th of the membership year. The union is required to retain the arbitrator at the end of the membership year. In view of the additional safeguards built into the TPPA rebate procedure —most notably the preliminary rebate, the independent arbitrator, and the interest bearing escrow account—the membership year constitutes a reasonably prompt period of time for the dissenting non-member to obtain an agency fee rebate.

With respect to the third element of the test set forth in *Hudson*, the escrow account established by the TPPA adequately protects the amount of the agency fee "reasonably in dispute" while challenges to the amount of the fee are pending. As noted above, this Court did not go so far as to require one hundred percent (100%) escrow of disputed agency fees. If the union chooses to escrow less than one hundred percent (100%), this Court cautioned that the limited escrow must be "carefully justif[ied]". The TPPA procedure has carefully justified the limited escrow of subsequent years' agency fees by basing the amount on the prior year's rebate and adding a five percent (5%) protective cushion. This practice falls well within the parameters set forth by this Court in *Hudson*.

In summary, the rebate procedure adopted by the Chicago Teachers Union contained numerous defects which prompted this Court to uphold the Seventh Circuit's invalidation of the procedure. These defects are not found

in the TPPA rebate procedure. The TPPA rebate procedure is distinguishable from the Chicago Teachers Union's procedure and falls within the acceptable parameters established by this Court in its affirmation of *Hudson*. As noted in the *Hudson* concurrence:

> [I]f the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.

See 54 U.S.L.W. 4236. The TPPA has provided for arbitration and has complied with all requirements set forth in the *Hudson* opinion. By virtue of this conformity, the *Hudson* opinion clearly resolves the issues raised in the Petition for a Writ of Certiorari. The Petition for a Writ of Certiorari must therefore be denied.

II. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FULLY CONSIDERED THE ISSUES BEFORE IT AND WAS CORRECT IN ITS AFFIRMATION OF THE LOWER COURT'S OPINION.

The United States Court of Appeals for the Sixth Circuit properly decided the issues before it in the case below. The essence of the Court's holding can be summarized in the following excerpts from the panel's well reasoned opinion:

> On appeal, the appellants raise several issues. Essential to each, though, is whether the district court was correct in ruling that §2129.97 of Toledo's Municipal Code is constitutionally valid under *Ellis v. Brotherhood of Railway Clerks*, ... U.S. ....., 104 S.Ct. 1883 (1984), *Abood v. Detroit Bd. of Education*,

431 U.S. 209 (1977), and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

Upon a review of the challenged Toledo city ordinance and of the agency shop rebate procedure addressed by the TPPA, Local 10, we are of the opinion that in the main they comport with the initial procedures which have been held to satisfy due process and the reported decisions as above cited. In so holding, we recognize that the plaintiffs have not as yet been permitted any extensive discovery which might ultimately bear upon whether the ordinance and plan will pass constitutional muster when they are in fact applied for those procedures are as yet untested and, though appearing fair, have not been adequately invoked. . . . [T]hose procedures and the procedures for the performing of the duties of the fee umpire and arbitrator are to be guided and controlled by the decisions of the United States Supreme Court in *Abood v. Detroit Board of Education, supra,* and other Supreme Court authority building upon those issues. Therefore, any conflicts which might otherwise cause us concern can be resolved by reference to those decisions and careful observance by all parties of the particulars of the plan as interpreted in the light of those decisions.

We do not perceive that due process requires us to anticipate issues which have not yet arisen or become ripe for decision and, of course, plaintiffs are not foreclosed from further postjudgment proceedings in the district court, should such problems arise.

See Petition Appendix A.

The Court of Appeals was correct in its admonition that the implementation of the rebate procedure must be strictly controlled by the decisions of the United States Supreme Court in *Abood* and its progeny. The rebate procedure adopted by the TPPA meets, and in some respects surpasses, the guidelines set forth by this Court concerning the collection of agency shop fees.

The United States Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), held agency shops in the public sector to be valid under federal law. The requirement that non-members help defray the costs of collective bargaining, contract administration, and grievance adjustment has been consistently upheld by federal courts interpreting *Abood*. *See e.g. Ellis v. B.R.A.C.*, ... U.S. ....., 104 S. Ct. 1883 (1984); *Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 54 U.S.L.W. 4231 (March 4, 1986); *Champion v. California*, 738 F.2d 1082 (9th Cir. 1984); *Robinson v. New Jersey*, 741 F.2d 598 (3rd Cir. 1984). This Court has further recognized the rebate procedure as a viable method of safeguarding the rights of objecting non-members, who are required to pay their fair share of costs of union representation. *See Abood*, 431 U.S. at 242; *International Assn. of Machinists v. Street*, 367 U.S. 740, 774-775 (1961); *Brotherhood of Clerks v. Allen*, 373 U.S. 113, 122-124 (1963).

The vast and consistent progeny emanating from the *Abood* decision have established beyond dispute that all persons receiving the benefits of union representation must pay their fair share of the costs of such representation. *See Abood*, 431 U.S. at 222. This Court was not oblivious to the free expression implications of compelled contribution from non-members, however. A certain de-

gree of interference with First Amendment rights was held to be:

> constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

See Abood, 431 U.S. at 222, *quoting, Railway Employees Department v. Hanson,* 351 U.S. 225 (1956). Thus, it has long been acknowledged that First Amendment rights are "implicated" in the agency shop context, but that some degree of interference is justified in the interest of preserving the union shop. In the decade following the *Abood* decision, this Court has consistently sought to preserve the vitality of non-members' First Amendment interests, and, at the same time, preserve the union's right to contribution for its collective bargaining efforts. Toward this goal, the collection of agency fees has been conditioned upon the caveat that such fees may not be used to fund ideological causes to which non-member employees are adverse.

A proper rebate procedure is the decisive factor in determining whether non-member First Amendment rights have been adequately protected. In defining the two extremes, this Court has rejected the "pure" rebate system, whereunder non-members' fees are utilized for political or ideological purposes and the portion so utilized is refunded at a later date. *See Ellis v. B.R.A.C.,* 104 S. Ct. at 1889-90. At the opposite end of the spectrum, this Court's recent affirmation of the Seventh Circuit's decision in *Chicago Teachers Union v. Hudson* noted that a system requiring a one hundred percent (100%) escrow of non-member dues:

> [h]as the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain.

See 54 U.S.L.W. at 4236. As noted in *Ellis*:

> [t]he very nature of the free-rider problem and the governmental interest in overcoming it requires that the union have a certain flexibility in its use of compelled funds.

See Ellis, 104 S. Ct. at 1892. This Court has long been of the opinion that:

> [r]estraining the collection of all funds . . . sweeps too broadly.

See International Assn. of Machinists v. Street, 367 U.S. at 771.

The TPPA rebate procedure strikes a precise balance which adequately protects non-member rights to free expression while, at the same time, narrowly combatting the free-rider problem. The escrow plan adopted by the TPPA contains extraordinary safeguards which prevent the TPPA from utilizing non-member funds for inappropriate causes. The TPPA rebate plan exemplifies the "precision of regulation" demanded by this Court in the development of any law or procedure which tends to have an impact upon First Amendment rights. *See NAACP v. Button*, 371 U.S. 415, 438 (1962), *see also Elrod v. Burns*, 427 U.S. 347, 363 (1976).[6] As this Court noted in *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973):

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6. The facts of *Elrod v. Burns* provide an instructive analogy to the agency shop context. The *Elrod* decision found that patronage dismissals of non-policy making government employees constituted a violation of the First and Fourteenth Amendments.

(Continued on following page)

> [i]f the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

See also Shelton v. Tucker, 364 U.S. 479, 488 (1960).

The TPPA rebate procedure, in conformity with the *Kusper* holding, is no broader than is necessary to remedy the problem of free-riders. The TPPA rebate procedure is not unnecessarily restrictive, yet still ensures that non-members pay for the representation that the TPPA is required by law to provide. As exclusive representative for all Toledo police patrolmen, the TPPA bargains for non-members as well as members. *See* Petition Appendix D. The District Court in its findings of fact properly determined that the procedures utilized by the TPPA to compel payment of dues do not impair free speech beyond the temporary deprivation of *de minimis* amounts

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Footnote continued—

This Court balanced the "contribution of patronage dismissals to [the] democratic process" against the degree of encroachment upon First Amendment freedoms and concluded that:

> [r]estraining political campaigning and management in the area of public employment leaves it free to continue in other settings. The consequence of no such restraint, however, is the complete restriction of individual belief and association for each public employee affected.

See Elrod, 427 U.S. at 371, n.27. By contrast, in the agency shop setting political restriction is neutralized by fee rebate procedures. The rebate procedure, to paraphrase *Elrod*, "leaves [political expression] free to continue in other settings." In *Elrod* the only way to banish the chilling effect of patronage practices upon free speech was to completely restrict political patronage dismissals. No outlet analogous to the rebate procedure was available to protect the public employees in *Elrod*. Thus, the agency shop fee rebate system provides a compromise whereby non-members remain free to express their political views while, at the same time, the union's interest in maintaining non-member support of union bargaining activities is served. In *Elrod*, this Court's goal was to ensure an outlet for free political speech. In the context of the agency shop, the same goal is effectuated by agency fee rebates.

of money which the non-members may (or may not) have used to fund political activities of their own choosing. The rebate procedure places the amount of the previous year's rebate plus five percent (5%) into an interest bearing escrow account, thus depriving the TPPA of access to that portion of the non-member dues. The five percent (5%) cushion adequately effectuates the union's intent to minimize the risk that any portion of the non-member agency fees will be used to advance union political causes.

The amount of the first year's rebate plus five percent (5%) as determined by an independent arbitrator, is placed into escrow in each subsequent membership year. The remainder of the second year's dues will be used for collective bargaining purposes only. The amount of the rebate for the second year plus five percent (5%) will determine the portion of non-member dues placed in escrow the third year, and so on. Thus, the TPPA procedure is flexible and is designed to be continually reflective of the actual percentages of non-member dues actually utilized for collective bargaining activities on the non-member's behalf. The procedure is therefore "closely drawn" within the meaning of this Court's mandate in *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), wherein this Court noted that "'[n]either the right to associate nor the right to participate in political activities is absolute.'" *See* 424 U.S. at 25, *quoting, C.S.C. v. Letter Carriers*, 413 U.S. 548, 567 (1973).

As *Abood* and its extensive progeny have demonstrated, the validity of the agency shop is a settled matter of law and the union's entitlement to non-member support cannot be disputed. *See Abood*, 431 U.S. at 242. The TPPA's escrow/neutral arbitration plan conforms not only

to the specific guidelines set in the context of the agency shop, but also meets the general requirements of due process as established in *Hudson v. Palmer,* ..... U.S. ....., 104 S. Ct. 3194 (1984); *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); *Armstrong v. Manzo,* 380 U.S. 545 (1965); and *Lee v. Western Reserve Psychiatric Habilitation Center,* 747 F.2d 1062, 1068 (6th Cir. 1984). In conformity with *Mathews,* the TPPA rebate procedure is implemented before any final deprivation of property occurs. *See Mathews,* 424 U.S. at 333. In *Hudson v. Palmer,* this Court elaborated upon the element of finality as follows:

> [A]n intentional deprivation of property does not give rise to a violation of the Due Process Clause if the state provides an adequate post-deprivation remedy.

See Hudson v. Palmer, 104 S. Ct. at 3204, n.14.

The adequacy of the post-deprivation remedy in the instant case is exemplified by the close fit between the amount placed in escrow and the amount of the previous year's expenditures for political and ideological causes. The five percent (5%) protective cushion is tailored to ensure that, should the non-member be deprived of any amount in excess of his fair share, such amount will be *de minimis* and the "risk of erroneous decision" will therefore be low. *See Mathews,* 424 U.S. at 335. The rebate system is designed so that the amount of non-member fees truly "at risk" in any given year will be minimal. Petitioners greatly overstate the unsubstantiated contention that the City of Toledo is sanctioning endless arbitrary "takings".

In summary, the United States Court of Appeals for the Sixth Circuit properly based its affirmation upon the guidelines that this Court has established for the

implementation of agency fee rebates. Incorporating by reference the previous discussion of this Court's recent decision in *Chicago Teachers Union v. Hudson*, it is clear that even if the *Hudson* affirmation had antedated the decision below, the decision below would still stand firmly upon its own merits. For these reasons, the Petition for a Writ of Certiorari must be denied on the grounds that the United States Court of Appeals for the Sixth Circuit correctly decided the issues presented in the case below.

III. THE DECISION BELOW PRESENTS NO CONFLICT WITH EITHER THE DECISIONS OF THIS COURT OR THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

The Petitioners allege that the decision below presents a conflict with the Seventh Circuit's decision in *Hudson v. Chicago Teachers Union, supra; School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 431 N.E.2d 180 (1982) and with various lower court decisions which do not require exhaustion of union rebate procedures as a prerequisite to litigation. With respect to the alleged conflict with the Seventh Circuit's decision in *Hudson*, the above discussion of this Court's recent affirmation of that decision effectively distinguishes the rebate procedure utilized in *Hudson* and establishes the TPPA rebate procedure's conformity with the standards for rebate procedures set forth in that affirmation. Similarly, the *Hudson* decision also resolves Petitioners' allegations of a conflict in the area of whether exhaustion of arbitration procedures should be a prerequisite to litigation. The concurrence in the *Hudson* affirmation clarifies the Court's opinion on the issue of exhaustion of internal union remedies as follows:

> [A]s I understand the Court's opinion . . . . if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.

See 54 U.S.L.W. at 4236 (White, *J.* concurring). With this clarification, the consistent line of case law requiring the exhaustion of valid internal union procedures was implicitly upheld.

The remaining case cited by Petitioners as presenting a conflict with the decision below is readily distinguishable from the facts at bar. The union in *Greenfield* utilized an agency shop scheme which called for payment of the entire amount of dues. The union made use of the full amount of non-member dues for "social, political, and speech activities" during the period between payment and refund. *See* 431 N.E.2d at 186. Further, the rebate procedure established by the union in the *Greenfield* case was characterized by the Court as "cumbersome to the extreme". *See* 431 N.E.2d at 188. The non-member fees were allocated among the Massachusetts Teachers Association, the National Education Association, and the local education association. Each entity had its own separate rebate procedure. The state and national procedures did not specify that the burden of proof would be on the collecting entity and dissenting non-members were not guaranteed access to the books and records upon which the return assessment would be based. All assessments were to be unilaterally made by the respective entity, whereafter the dissenting non-member was required to appeal first to the appropriate executive committee, then, finally, to arbitration which was also conducted separately by each of the entities. *See* 431 N.E.2d at 186, n.4.

This outrageously complicated ritual cannot reasonably be compared with the streamlined policy adopted by the TPPA. Every effort has been made to simplify the rebate procedure and provide adequate information to non-members at every stage of the proceedings. Further, the burden of establishing entitlement to non-member fees lies solely with the TPPA. The TPPA plan employs a one step objection to the amount of agency fees, followed by impartial arbitration. Any non-member who is still aggrieved following the arbitrator's determination remains free to pursue a judicial remedy. The court below expressly preserved the petitioners' right to pursue further claims in the judicial forum:

> We do not perceive that due process requires us to anticipate issues which have not yet arisen or become ripe for decision and, of course, plaintiffs are not foreclosed from further postjudgment proceedings in the district court, should such problems arise.

See Petition Appendix A.

The Supreme Court of Massachusetts acknowledged that:

> dissenting employees may constitutionally be required to pay the disputed fee into a neutral escrow account pending adjudication . . . .

See 431 N.E.2d at 189. The Supreme Court of Massachusetts thereby endorsed the escrow alternative, which was not a part of the *Greenfield* scheme, noting that:

> [e]scrowing the fees ensures that the organization will receive the money it is entitled to and substantially reduces the interference with the organization's functions.

See 431 N.E.2d at 189, *citing, Allen, supra,* 373 U.S. at 120. Thus, the *Greenfield* decision does not represent a divergent opinion upon the same facts as the case below. Rather, it is a decision arriving at a different result on the basis of distinguishable facts. The decision below does not present a conflict when viewed in light of the Supreme Court of Massachusetts' decision, therefore, the alleged conflict should not be used as a basis for granting the Petition for a Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 85-1434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES TIERNEY, *et al.*,

Petitioners,

v.

CITY OF TOLEDO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. INTRODUCTION

This Court could not have been more clear in its decision in *Chicago Teachers Union v. Hudson*, ____ U.S. ____, 54 U.S.L.W. 4231 (March 4, 1986). In unambiguous language, this Court held that a "least restrictive means" analysis must be applied to agency fee collection systems to protect the constitutional rights of all objecting agency fee payors. *Id.*, 54 U.S.L.W. at 4234, n.11 and 12.

The Sixth Circuit did not have the benefit of this analysis when it upheld the City of Toledo ordinance

and the Toledo Police Patrolmen's Association's (TPPA) rebate system, and neither did the TPPA when it created its self-serving rebate mechanism.

Yet, the TPPA argues in its Brief in Opposition to the Petition for a Writ of Certiorari that its rebate scheme fully complies with this Court's decision in *Hudson*. This very predictable response by the TPPA is laughable, in light of the clear mandate of this Court in *Hudson*. Therefore, as was done in *Abernathy v. San Jose Teachers Association*, ____ U.S. ____, 54 U.S.L.W. 3598 (March 10, 1986), this Court must grant the instant Petition for a Writ of Certiorari, and either allow a plenary hearing or vacate and remand the Sixth Circuit's decision for further consideration in light of *Chicago Teachers Union v. Hudson*.[1]

II. ARGUMENT

In *Chicago Teachers Union v. Hudson*, this Court held that before a public employer is allowed to take agency fees from objecting employees, the following must exist:

1) a procedure which minimizes the risk that nonunion employees' contributions might be used for impermissible purposes, such procedure to include a good faith advance reduction in the amount of a voluntary union member's dues;

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[1] It should be noted that the City of Toledo has not filed a Brief in Opposition to the Petition for a Writ of Certiorari. Apparently the City of Toledo now recognizes its governmental responsibility, and agrees with petitioners' argument that the Petition for a Writ of Certiorari should be granted, in light of this Court's holding that "*the government* and the union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Hudson*, *supra*, 54 U.S.L.W. at 4235, n.20. (Emphasis added.)

2) adequate financial disclosure sufficient to justify the advance reduction in the dues and to allow the employee to intelligently decide whether to object; and

3) a reasonably prompt decision by an impartial decision-maker.

As will now be shown, the Toledo ordinance and TPPA rebate procedure approved by the Sixth Circuit are woefully inadequate to comply with these exacting standards.

A.) In plain language, the *Hudson* decision requires public employee unions to provide agency fee payors with a *bona fide* advance reduction in the amount of the dues. No longer, said this Court, can unions rely upon "a remedy which merely offers dissenters the possibility of a rebate. . ." *Id.*, 54 U.S.L.W. at 4235. However, that is precisely the type of flawed procedure provided by the Toledo ordinance.[2] The TPPA rebate plan, enacted pursuant to the Toledo ordinance, is nothing but a glorified rebate scheme. Under this plan, *nonunion employees are to be deprived of 100% of the voluntary member's dues every year*! There is *never* an advance reduction permitted under the TPPA rebate plan. Admittedly, the TPPA escrows some of the money which the nonmembers must pay, but the overall result is clear: every nonmember must part with 100% of the dues, only to get some back later. As this Court made clear in *Hudson*, the union's

[2] Toledo Municipal Code § 2129.97(a) permits the TPPA to exact an agency fee *equal* to a voluntary member's dues. (*See* Petition Appendix D.) It is undisputed in this case that the TPPA has sought to collect from the petitioners an agency fee equal to the voluntary member's dues, with only a postdeprivation internal union rebate system provided to give petitioners some of their money back.

decision to escrow even 100% of the money does not correct the initial violation which occurs when an excessive and unjustifiable fee is exacted.

Incredibly, TPPA seeks to justify its lawless interpretation of *Hudson* by arguing that "[Unlike the union in Hudson] the TPPA plan does not grant an arbitrary advance reduction for nonmember dues . . . ." (TPPA Brief, pages 6-7.) TPPA fails to admit, however, that it grants *no* advance reduction to petitioners, either arbitrary or otherwise. It continuously seeks payment of 100% of the dues, followed only by a partial escrow and postdeprivation rebate system.

Thus, it is both a cause of sadness and frustration to see the TPPA still arguing in favor of the legality of its rebate scheme, even after the unequivocal *Hudson* holding that "a forced exaction followed by a rebate equal to the amount improperly expended is not a permissible response to the nonunion employees' objections." *Id.*, 54 U.S.L.W. at 4235.

B.) Neither the Toledo ordinance nor the TPPA rebate procedure requires the union to justify, in advance, *why* the fee is set at a given level. Even a cursory review of the TPPA rebate procedure shows that it contains no mechanism by which the union will give "adequate financial disclosure" to the all potential objectors prior to setting the fee and demanding payment. There was certainly no "adequate financial disclosure" provided in the past when TPPA unilaterally demanded 100% of the dues from all nonmembers, with no advance disclosure whatsoever.

TPPA argues that it complies with the "adequate financial disclosure" requirement of *Hudson* because it

provides the nonmembers with "a copy of the TPPA budget" *after* they have objected. Unfortunately for TPPA, however, this Court's requirement of "adequate financial disclosure" encompasses more than just the giving of a copy of the budget after the fee is calculated. This Court made clear in *Hudson* that the adequate financial disclosure must be provided before the amount of the agency fee is set, as part of the union's duty to initially justify the fee.

Furthermore, petitioners simply do not believe that receipt of "a copy of the TPPA budget" satisfies the standards set forth by this Court in *Hudson*. ". . . [A]dequate disclosure surely would include the major categories of expense, as well as verification by an independent auditor."[3] *Hudson*, *supra*, 54 U.S.L.W. at 4235, n.18. The TPPA rebate procedure is silent concerning the use of "independent auditors," and thus it does not comply with *Hudson*.

C.) *Hudson* also requires that an "impartial decisionmaker" hear objections and decide the chargeable amount of the fee. The TPPA rebate procedure states only that the TPPA will "retain" an arbitrator. Nowhere does the rebate procedure state how (or by whom) this private arbitrator will be chosen. Only after this suit was brought did the TPPA's attorney *orally* promise the district court that the "National Academy of Arbitrators"

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[3] This Court even referred to the requirements of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 431(b), as a possible guide for the requirements of this type of adequate financial disclosure. *Hudson*, *supra*, 54 U.S.L.W. at 4235, n.17. For cases which discuss the stringent financial disclosure provisions of 29 U.S.C. § 431(b), *see, e.g.*, *Antal v. District 5, United Mine Workers of America*, 334 F. Supp. 903 (W.D. Pa. 1971), *aff'd*, 451 F.2d 1187 (3d. Cir. 1971).

would choose the arbitrator. This promise, however, appears nowhere in the rebate procedure or the City of Toledo ordinance.[4] Thus, on its face, the TPPA rebate procedure contains the same provision for unilateral selection of the arbitrator that was struck down in *Hudson*. Furthermore, unilateral selection of the "National Academy of Arbitrators" as the body who will choose a decisionmaker to decide petitioners' constitutional rights is only one small step removed from unilateral selection of the arbitrator himself. *See, e.g., Richards v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 64 Cal. Rptr. 899 (1976).

Finally, TPPA argues that its "end of the year" arbitration complies with *Hudson's* requirement that the impartial decisionmaker render a "reasonably prompt decision." (TPPA Brief, page 11.) It strains *Hudson* to the breaking point, however, for TPPA to suggest that an arbitration more than one year after the fees are paid constitutes a reasonably prompt decision. Such a delay is intolerable and cannot be countenanced when First Amendment rights are at stake.

CONCLUSION

Plainly and simply, the City of Toledo and the TPPA have failed to comply with the dictates of *Hudson*. The

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[4] In any event, petitioners do not believe that they should be required to utilize a private arbitration system as a prerequisite to receiving judicial protection of their constitutional rights. Since the private arbitrator's deicision cannot have *res judicata* effect in any subsequent judicial challenge to the agency fee, *McDonald v. City of West Branch*, ____ U.S. ____, 104 S. Ct. 1799 (1984), there is no logical reason to require nonunion employees to exhaust this type of private arbitration system. *See also Patsy v. Board of Regents*, 457 U.S. 496 (1982).

petitioners can no longer be required to be deprived of 100% of the dues, yet this is precisely what the Toledo ordinance and TPPA rebate procedure require every year. The district court specifically found that the TPPA rebate system "does not eliminate entirely all opportunity for the union to use some portion of the [agency fee] for a short period for political purposes," but upheld the constitutionality of that system anyway. That holding was obviously wrong under *Hudson's* "least restrictive means" analysis. Similarly, the Sixth Circuit did not have the benefit of the *Hudson* ruling when it affirmed the district court.

Because the Sixth Circuit issued its *per curiam* opinion prior to this Court's *Hudson* decision, this Court must, at the very least, grant this petition for certiorari and vacate and remand for further consideration in light of *Hudson*. Alternatively, petitioners pray that this Court grant this petition for certiorari and allow a plenary hearing.

Respectfully submitted,

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